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# Adaptive Discrimination

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## ADAPTIVE DISCRIMINATION\*

ELISE C. BODDIE\*\*

*This Article critiques the assumption in constitutional law that racial discrimination is siloed, static, and time limited. It argues instead that discrimination is systemic, dynamic, and intergenerational due to its adaptive nature. The Article sets forth a theory of “adaptive discrimination”—that discrimination adapts to law and to social norms prohibiting intentional discrimination. This process begins with public and private efforts to evade antidiscrimination law and persists through vehicles of white privilege, racialized class ideologies, and implicit biases that embed in facially race-neutral laws and practices. These subtler racial processes continuously reproduce and entrench racial disadvantage across our social landscapes. By explaining how discrimination adapts over time, this theory helps to account for the persistence of vast inequality, despite formal racial progress under the law. Using cases across different civil rights contexts as examples, the Article also identifies and critiques time-centered assumptions in constitutional doctrine that discrimination “expires,” which further obscure discrimination’s adaptive qualities. The Article contends that the Supreme Court has relied on these conceptions of time to justify the termination of judicial and legislative remedies, allowing discrimination to continue unchecked. It proposes changes to constitutional law that would curb adaptive discrimination and outlines a framework for an enforcement mechanism to match discrimination’s endurance and dynamic complexity.*

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*“The better we know our racial past, the better we know our racial present.”*

—Joe R. Feagin<sup>1</sup>

#### INTRODUCTION: TOWARD A THEORY OF ADAPTIVE DISCRIMINATION

On August 9, 2014, Michael Brown, an unarmed black teenager, was shot to death by a white police officer in Ferguson, Missouri.<sup>2</sup> Brown’s killing, and the grand jury’s subsequent refusal to indict the officer responsible for his death, sparked national outrage and demonstrations across the country.<sup>3</sup> Pundits and advocates alike saw the incident as evidence of a pervasive problem of excessive use of force by police against black males.<sup>4</sup> In the investigative report that followed the killing, the U.S. Department of Justice documented extensive racial problems with the law enforcement practices of the Ferguson Police Department.<sup>5</sup>

Yet disparities in policing are just one indicator of the racial inequality spread throughout the St. Louis metropolitan area around

1. JOE R. FEAGIN, *THE WHITE RACIAL FRAME: CENTURIES OF RACIAL FRAMING AND COUNTER-FRAMING* 1 (2d ed. 2013).

2. See *Tracking the Events in the Wake of Michael Brown’s Shooting*, N.Y. TIMES (Nov. 24, 2014), [http://www.nytimes.com/interactive/2014/11/09/us/10ferguson-michael-brown-shooting-grand-jury-darren-wilson.html?\\_r=0#/#time354\\_10512](http://www.nytimes.com/interactive/2014/11/09/us/10ferguson-michael-brown-shooting-grand-jury-darren-wilson.html?_r=0#/#time354_10512) [<https://perma.cc/J3W9-67UR>].

3. See, e.g., John Eligon & Manny Fernandez, *In Protests from Midwest to Both Coasts, Fury Boils Over*, N.Y. TIMES (Nov. 24, 2014), <http://www.nytimes.com/2014/11/25/us/frustration-months-in-the-making-boils-over-on-the-streets-of-ferguson.html> [<https://perma.cc/UV7N-6P33>]; David Dante Troutt, *Is Racial Justice Possible in America?*, THE NATION (Dec. 10, 2014), <http://www.thenation.com/article/racial-justice-possible-america/> [<https://perma.cc/5GSU-N7UT>].

4. See, e.g., Branden Cobb, *Recent Violent Confrontations Between Black Males and Police*, CBS NEWS (Nov. 24, 2014, 9:31 PM), <http://www.cbsnews.com/news/recent-violent-confrontations-between-Black-males-and-police/> [<https://perma.cc/9CXF-H6SX>]; Rebecca Leber, *Police Officers Are More Likely to Shoot Black Men, Studies Suggest*, NEW REPUBLIC (Aug. 12, 2014), <http://www.newrepublic.com/article/119060/michael-brown-studies-show-racial-bias-police-shootings> [<https://perma.cc/PZB4-2LRX>]; Nina Storchlic, *The 14 Teens Killed by Cops Since Michael Brown*, DAILY BEAST (Nov. 25, 2014, 4:45 PM), <http://www.thedailybeast.com/articles/2014/11/25/the-14-teens-killed-by-cops-since-michael-brown.html> [<https://perma.cc/2LBW-EVDT>].

5. See generally CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, *INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT* (2015) [hereinafter DOJ REPORT], [http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) [<https://perma.cc/FJ8L-LLLJ>] (describing how law enforcement’s “focus on revenue” rather than on “public safety needs” led to unconstitutional and racially biased practices that fostered community distrust and resentment).

Ferguson.<sup>6</sup> Many accounts of the racial tragedy begin with Brown's fatal interaction with the police officer.<sup>7</sup> But by widening our frame of reference and extending it backwards in time, we can also situate Brown's death in a broader social context of longstanding, systemic, and dynamic racial subordination.<sup>8</sup> In so doing, we learn to appreciate the fluidity of racial discrimination and the ways it morphs through time across our social, economic, and political landscapes. We can see, for instance, how racial disparities in Ferguson's policing practices relate to the city's segregated schools and majority-white municipal power structure, as well as to earlier episodes of housing and employment discrimination throughout the greater St. Louis metropolitan area.<sup>9</sup> Though each of these problems has manifested in

6. See generally RICHARD ROTHSTEIN, ECON. POLICY INST., *THE MAKING OF FERGUSON: PUBLIC POLICIES AT THE ROOT OF ITS TROUBLES* (2014), <http://www.epi.org/files/2014/making-of-ferguson-final.pdf> [https://perma.cc/F3HB-RQBZ] (describing the multiple forms and sources of racial inequality in and around Ferguson). I am indebted to Rothstein for his thorough analysis of racial discrimination in Ferguson and the surrounding area.

7. See, e.g., Rachel Clarke & Christopher Lett, *What Happened When Michael Brown Met Officer Darren Wilson*, CNN (Nov. 4, 2014, 5:22 PM), <http://www.cnn.com/interactive/2014/08/us/ferguson-brown-timeline/> [https://perma.cc/8ATY-NSRB]; Laura Santhanam & Vanessa Dennis, *What Do the Newly Released Witness Statements Tell Us About the Michael Brown Shooting?*, PBS NEWSHOUR (Nov. 25, 2014, 7:43 PM), <http://www.pbs.org/newshour/updates/newly-released-witness-testimony-tell-us-michael-brown-shooting/> [https://perma.cc/GB22-WJLX]; Michael Schwartz & Richard A. Oppel Jr., *Experts Weigh Police Officer's Decisions Leading to Fatal Shooting of Teenager*, N.Y. TIMES, Nov. 27, 2014, at A1; *The Michael Brown Shooting: The St. Louis Blues*, ECONOMIST (Aug. 16, 2014), <http://www.economist.com/news/united-states/21612199-police-kill-unarmed-teenager-sparking-riots-st-louis-blues> [https://perma.cc/4DD9-DCA7]. But see David Von Drehle, *The Long, Tangled Roots of the Michael Brown Shooting*, TIME (Aug. 12, 2014), <http://time.com/3104128/michael-brown-ferguson-cop-shooting-protests/> [https://perma.cc/6686-BEPQ] (discussing the history of Ferguson, including zoning laws and boundaries that bred racial inequality).

8. See *infra* Section I.B. I use the term "subordination" to refer to a process formed through rules, behaviors, and norms that consistently drives the status quo to racial inequality. See Jerome M. Culp, Jr. et al., *Subject Unrest*, 55 STAN. L. REV. 2435, 2448 (2003) (distinguishing "discrimination" from "subordination").

9. See *infra* Section I.B; see also *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307–08 (1977) (discussing elements of pattern and practice employment discrimination in the hiring of black teachers in St. Louis County); DOJ REPORT, *supra* note 5, at 2, 9–15 (describing how revenue-generating pressures on local police and municipal courts led to racially biased law enforcement practices); Nikole Hannah-Jones, *School Segregation, the Continuing Tragedy of Ferguson*, PROPUBLICA (Dec. 19, 2014), <http://www.propublica.org/article/ferguson-school-segregation> [https://perma.cc/W4DH-85C5]; Jeff Smith, Opinion, *Black Town, White Power*, N.Y. TIMES (Aug. 17, 2014), <http://www.nytimes.com/2014/08/18/opinion/in-ferguson-black-town-white-power.html> [https://perma.cc/YN4N-ULC2] (describing racial dynamics that led to Ferguson's "virtually all-white power structure" despite its "majority-black" demographics, and discussing the "economic pressures that inflame[d] racial tension" in Ferguson); *Ferguson-Florissant School District Data*

different ways, at different times, and even in different places, this Article contends that they are all part of a larger ecosystem of discrimination.

Our limited cognitive abilities often lead us to miss these relationships. Social science reveals that the conventional explanation of the Ferguson shooting incident, as a problem of policing alone, is typical of how we process complex information. Indeed, it is human intuition to look for a linear story of cause and effect—a discrete event that occurs at an identifiable moment—to explain an outcome.<sup>10</sup> This intuition leads us to couch multifaceted racial problems in more simplistic terms.<sup>11</sup> By framing discrimination primarily as a problem of specific individuals or institutional wrongdoing that manifests itself in time-limited ways, law yields to these same impulses.<sup>12</sup>

This Article sets forth a theory of adaptive discrimination that rejects constitutional law's linear, time-centered interpretations of racial discrimination. Its premise is that racial discrimination *adapts* to the legal and social environment by mutating to evade prohibitions against intentional discrimination.<sup>13</sup> As it morphs to avoid legal and social sanction it spreads across multiple domains.<sup>14</sup> The Article defines adaptive discrimination as consisting of public and private actions and institutional rules and norms that synergistically

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*Collection*, OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC. (2011), <http://ocrdata.ed.gov/Page?t=d&eid=27900&syk=6&pid=736> [<https://perma.cc/KP3Y-94QF>] (showing that the Ferguson-Florissant School District was 77.1% African-American; 15.6% White; 2.3% Hispanic; and 0.6% Asian). See generally Complaint, Mo. State Conference of the NAACP v. Ferguson-Florissant Sch. Dist., Civ. No. 14-2077 (E.D. Mo. Dec. 18, 2014) (alleging voting discrimination as a result of the at-large election system in the Ferguson-Florissant School District).

10. See John D. Sterman, *System Dynamics Modeling: Tools for Learning in a Complex World*, 43 CAL. MGMT. REV. 8, 11 (2001) [hereinafter Sterman, *System Dynamics Modeling*] ("Where the world is dynamic, evolving, and interconnected, we tend to make decisions using mental models that are static, narrow, and reductionist.").

11. See *id.* (describing individuals' general tendency to adopt an "event-oriented, reactionary approach to problem-solving").

12. See *infra* Part II.

13. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 21 (2010) ("Any candid observer of American racial history must acknowledge that racism is highly adaptable. The rules and reasons the political system employs to enforce status relations of any kind, including racial hierarchy, evolve and change as they are challenged.").

14. See Stephen M. Rich, *One Law of Race?*, 100 IOWA L. REV. 201, 213–14 (2014) ("Race discrimination may be viewed as an interactive system spread across social contexts, according to which inequality in one area, such as healthcare or education, fuels discrimination in another, such as employment, housing or voting.").

regenerate racial inequality across social systems through time.<sup>15</sup> These “systems,” which I refer to throughout this Article, set the stage for racial tragedy, much like the fatal shooting of Michael Brown.

Conceptualizing racial discrimination as adaptive—rather than as piecemeal, static, and aberrational—allows us to see it for what it is: a living, metastatic disease. Pinpointing the many sources of adaptive discrimination, however, is difficult.<sup>16</sup> This Article contends that it begins with government entities, public and private organizations, and individuals who skirt both laws prohibiting intentional discrimination and the rules of socially acceptable<sup>17</sup> conduct by reconstituting discrimination in less overt forms.<sup>18</sup> Once reconstituted, discrimination persists through ostensibly race-neutral institutional rules, laws, and behaviors<sup>19</sup> that converge around norms of white privilege,<sup>20</sup> racialized class ideologies,<sup>21</sup> and pervasive implicit racial

15. See *infra* Part I.

16. Cf. John A. Powell, *Race and Class: An Intersectional Perspective*, 25 LAW & INEQ. 355, 358 (2007) (contending that a “broader, richer understanding of race” should look beyond “individual, intentional[, and] unconscious discrimination” to examine “cultural meaning, institutional arrangements and their interactions”).

17. See *infra* Part I; FEAGIN, *supra* note 1, at 89 (“Psychological research has found that many white respondents alter comments on racial issues to appear unprejudiced.”); see also *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1082 (3d Cir. 1996) (“Discrimination continues to pollute the social and economic mainstream of American life, and is often simply masked in more subtle forms. It has become easier to coat various forms of discrimination with the appearance of propriety, or to ascribe some other less odious intention to what is in reality discriminatory behavior. In other words, while discriminatory conduct persists, violators have learned not to leave the proverbial ‘smoking gun’ behind.”); *Riordan v. Kempiners*, 831 F.2d 690, 697 (7th Cir. 1987) (“Defendants of even minimal sophistication will neither admit discriminatory animus [nor] leave a paper trail demonstrating it.”).

18. The dynamics of adaptive discrimination are similar to what Reva Siegel has described as “preservation-through-transformation[.]” in which “[e]fforts to reform a status regime bring about changes in its rule structure and justificatory rhetoric.” Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997).

19. See generally DARIA ROITHMAYR, *REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE* (2014) (describing the facially race-neutral social, economic, and political processes that reproduce white advantage across generations); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1849–57 (1994) (explaining the role that jurisdictional boundaries play in perpetuating racial inequality).

20. Cf. Martha R. Mahoney, *Segregation, Whiteness, and Transformation*, 143 U. PA. L. REV. 1659, 1661 (1995) [hereinafter Mahoney, *Segregation*] (“The construction of race in America today allows whiteness to remain a dominant background norm, associated with positive qualities, for white people, and it allows unemployment and underemployment to seem like natural features of black communities.”).

bias.<sup>22</sup> These dynamics—which are a function both of discrimination that we typically associate with racial “intent” and the passive reinforcement of its discriminatory effects—create an equilibrium of inequality that continues to deny African Americans, in particular, opportunity, status, and power as a group.<sup>23</sup>

Understanding racial discrimination as a complex, adaptive system—rather than as aberrational or as a historical artifact unconnected to present disadvantage—alerts us to its multidimensionality and persistence across generations.<sup>24</sup> Appreciating the role that adaptive discrimination plays in structuring choices and opportunities also reduces incentives to blame the individuals who are trapped by such systems and to focus instead on addressing racial harms.

This Article uses the term “discrimination” to include behavior that we conventionally define in terms of racial “intent” and to encompass facially race-neutral policies that generate adverse racial effects. However, neither of these concepts, under existing antidiscrimination law, either alone or together, captures adaptive discrimination’s multifaceted nature.<sup>25</sup> Intent doctrine focuses on

21. See generally Martha R. Mahoney, *Class and Status in American Law: Race, Interest, and the Anti-Transformation Cases*, 76 S. CAL. L. REV. 799 (2003) [hereinafter Mahoney, *Class and Status*] (examining the complex relationship between race and class).

22. See *infra* Part II.

23. Dr. W.E.B. Du Bois predicted the persistence of racial inequality when he observed in 1903 that the “color-line” would be the “problem of the Twentieth Century.” W.E. BURGHARDT DU BOIS, *THE SOULS OF BLACK FOLK: ESSAYS AND SKETCHES*, at vii (1903). I focus most of my observations in this Article on the experiences of African Americans, the racial group most conventionally identified with racial subordination. See Derrick Bell, *Racism Is Here to Stay: Now What?*, 35 HOW. L.J. 79, 79 (1991) (asserting that “[b]lack people will never gain full equality in this country”); cf. FEAGIN, *supra* note 1, at 101 (observing that racially subordinating practices tend to be more focused on blacks than other people of color). William Julius Wilson prominently argued that class, rather than race, accounts for the most persistent disadvantage among African Americans. WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 112–18, 146–49 (1987). But see Powell, *supra* note 16, at 858 (arguing “that race and class are distinct and at the same time mutually constitutive, recursive processes in the United States that render race and class radically incoherent without understanding their interactive nature”).

24. See Siegel, *supra* note 18, at 1111 (“Once we recognize that the rules and reasons the legal system employs to enforce status relations evolve as they are contested, we ought to scrutinize justifications for facially neutral state action with skepticism, knowing that we may be rationalizing practices that perpetuate historic forms of stratification, much as *Plessy v. Ferguson* once did.”).

25. Cf. FEAGIN, *supra* note 1, at 3 (“Much recent research on racial matters continues to emphasize the prejudice and bias terminology and approach in assessing what are often termed racial ‘disparities’ . . . . These concepts, although certainly useful, are far from



discrimination, typically thought to result from racial animus,<sup>26</sup> against identifiable persons or groups. Disparate impact addresses policies and practices that perpetuate group-based inequality.<sup>27</sup> But because it primarily reaches discrimination that is specific to a particular institution,<sup>28</sup> it too obscures the connective relationships and dynamic interactions that reproduce racial disadvantage across our social landscape.<sup>29</sup>

Whatever the statutory limitations of disparate impact under federal civil rights law, however, constitutional law is far worse. Equal protection precludes discrimination claims based on impact alone,<sup>30</sup> narrowly defines intent,<sup>31</sup> and embraces colorblind rationales that focus on the presumed harms of racial classifications, rather than on the harms of racial subordination.<sup>32</sup> Thus, equal protection serves only

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sufficient to assess and explain the foundational and systemic racism of the United States.”); George Rutherglen, *Discrimination and Its Discontents*, 81 VA. L. REV. 117, 117 (1995) (arguing that “the concept of discrimination is at least incomplete and probably insufficient to remedy persistent forms of inequality in the workplace”).

26. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 298 (1987) (requiring specific intent); *Pers. Adm’r v. Feeney*, 442 U.S. 256, 279 (1979) (concluding that “intent” refers to conduct taken “because of” and not merely “in spite of” a protected characteristic). But see *Rogers v. Lodge*, 458 U.S. 613, 624–26 (1982) (concluding that awareness of adverse outcomes was sufficient to invalidate a facially neutral state law that effectively disfranchised black voters); *Castaneda v. Partida*, 430 U.S. 482, 493 (1977) (advancing an effects standard in the context of grand jury selection).

27. See Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 499 (2003) (noting disparate impact’s implicit focus on “historically embedded hierarchies” and group inequality); Rich, *supra* note 14, at 230 (“Disparate-impact theory distributes liability on a structural basis, examining the interaction between facially neutral conduct and racially identifiable external factors . . .”).

28. See Charles A. Sullivan, *The World Turned Upside Down?: Disparate Impact Claims by White Males*, 98 NW. U. L. REV. 1505, 1561 (2004) (observing that “the plaintiff normally has the burden of identifying the specific practice she claims is posing a barrier to her group”).

29. See *infra* Section II.A.2.

30. See *Washington v. Davis*, 426 U.S. 229, 239 (1976). But see generally Sheila Foster, *Intent and Incoherence*, 72 TUL. L. REV. 1065 (1998) (discussing the complexity of intent doctrine and rebuffing notions that intent operates according to one standard).

31. See Foster, *supra* note 30, at 1079–82 (discussing *Castaneda* and different permutations of the intent standard that allow an inference of intent based on adverse racial impact); Primus, *supra* note 27, at 536; see also, e.g., cases cited *supra* note 26. See generally David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 956–65 (1989) (discussing different conceptions of intent).

32. See *infra* Section II.A; see also Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1363 (2010) (describing colorblindness “as the guiding value of equal protection”).

to redress discrete, individualized discrimination—systemic racial inequality is taken as a given.<sup>33</sup>

Worse still, constitutional law *facilitates* adaptive discrimination by limiting the power of the federal courts and of Congress to dismantle racial discrimination that manifests over time.<sup>34</sup> For example, the Court has limited the equitable authority of district courts to retain jurisdiction over school desegregation cases where school districts demonstrate that they have sought in “good faith” to eliminate the vestiges of their prior discrimination to a “practicable” extent.<sup>35</sup> The Court also disabled a key provision of the federal Voting Rights Act that curbed discriminatory practices in jurisdictions with a longstanding history of racial discrimination.<sup>36</sup> These cases insulate segregation in public schools from judicial review and protect voting practices that effectively exclude minority voters from the democratic process.<sup>37</sup> As a result, public schools in the South have become increasingly racially segregated<sup>38</sup> and state and local elections have been distorted by lack of minority participation.<sup>39</sup> In short, constitutional law embraces rules that embed discriminatory outcomes, with consequential results.<sup>40</sup>

Some of these doctrinal choices can be explained by concerns about the judiciary’s constitutional authority and institutional competence to manage the social forces that extend beyond specific

33. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 310 (1978) (opinion of Powell, J.) (rejecting “societal discrimination” as a constitutional justification for affirmative action).

34. See *infra* Section II.C; see also Siegel, *supra* note 18, at 1111 (“Once we recognize that the rules and reasons the legal system employs to enforce status relations evolve as they are contested, we ought to scrutinize justifications for facially neutral state action with skepticism, knowing that we may be rationalizing practices that perpetuate historic forms of stratification, much as *Plessy v. Ferguson* once did.”).

35. See *infra* Section II.C.2.

36. See *infra* Section II.C.2.

37. See *infra* Section II.C.2.

38. See Danielle Holley-Walker, *A New Era for Desegregation*, 28 GA. ST. U. L. REV. 423, 431 (2012) (observing that many public schools have resegregated in the wake of the Court’s decisions in the early 1990s limiting the power of the federal judiciary in school desegregation cases).

39. See *infra* Section I.A.1.

40. Although I do not explore it in any depth here, I concede that statutory law may be more useful for challenging practices that marginalize people of color due to the availability of disparate impact claims against policies and practices that have a disproportionate, adverse racial effect. However, even these claims demand that plaintiffs identify a causal connection between the challenged practice and the discriminatory effect. See, e.g., *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2514 (2015).

conduct in discrete cases.<sup>41</sup> Institutional deference to state legislative processes also partly explains these outcomes.<sup>42</sup> Other choices, such as the Court's decisions to strike down race-specific affirmative action policies that target pervasive racial inequality, can be attributed to colorblindness rationales in equal protection doctrine.<sup>43</sup>

This Article points to another explanation for the Court's constrained constitutional interpretations and the deeply flawed accounts of racial discrimination that undergird them. It traces the Court's decisions to assumptions that discrimination ceases with the passage of time—in other words, that it expires, rather than adapts. Our human tendency is to favor simplistic solutions to multifaceted problems and then to judge the success (or failure) of these solutions prematurely.<sup>44</sup> In so doing, we overlook the problem of time lags between the implementation of a remedy and the realization of its objective.<sup>45</sup> Because judges naturally are susceptible to the same human instincts, they too are captive to linear thinking. The Court's emphasis on time drives its conclusions that discrimination no longer exists at all or that it no longer exists in a form that merits constitutional remedy.<sup>46</sup> These time-centered notions blind the Court to the complex operations that constitute systemic racial discrimination, leading it to terminate judicial and legislative

41. See Rich, *supra* note 14, at 218–20 (discussing the Court's decision in *Washington v. Davis*, 426 U.S. 229 (1975), which limited equal protection claims to proof of discriminatory purpose due to concerns about the federal judiciary's institutional capacity to manage broader claims and to safeguard separation of powers).

42. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 136 (1980); Paul Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 127–28 [hereinafter Brest, *Legislative Motive*]; Paul Brest, *Reflections on Motive Review*, 15 SAN DIEGO L. REV. 1141, 1142 (1978) [hereinafter Brest, *Reflections*] (“If the motives underlying an administrative or a legislative enactment should be insulated from judicial review, it must be for institutional rather than jurisprudential reasons.”).

43. See *infra* Section II.A.4.

44. See John D. Sterman, *Communicating Climate Change Risks in a Skeptical World*, 108 CLIMATIC CHANGE 811, 816–18 (2011) [hereinafter Sterman, *Climate Change*] (discussing how misconceptions of time can lead to miscalculations when designing remedies).

45. Cf. Sterman, *System Dynamics Modeling*, *supra* note 10, at 12 tbl.2 (“In complex systems cause and effect are distant in time and space while we tend to look for causes near the events we seek to explain. Our attention is drawn to the symptoms of difficulty rather than the underlying cause. High leverage policies are not obvious.”).

46. See *infra* Section II.C.

remedies for discrimination that the Justices perceive (erroneously) as long since past.<sup>47</sup>

These conceptions of time have long been at the center of the Court's constitutional race jurisprudence, although they have surfaced in some cases more explicitly than others. The Court's use of time extends as far back as its decision in the *Civil Rights Cases*,<sup>48</sup> which invalidated federal antidiscrimination legislation, declaring its impatience with civil rights measures less than two decades after the Civil War and the formal end of slavery.<sup>49</sup> The Court's focus on time has also led it to reject "societal discrimination" as a justification for voluntary affirmative action policies.<sup>50</sup>

As mentioned earlier, the Court in more recent decades has invoked concerns about the length of time that local school districts have been subject to court supervision as a basis for ending judicial remedies for school desegregation. And it extended similar reasoning to Congress's Section 5 powers under the Fourteenth Amendment in *Shelby County v. Holder*<sup>51</sup> when it disabled a core provision of the Voting Rights Act.<sup>52</sup> The Court objected that the provision—which required jurisdictions with a record of discrimination to pre-clear voting changes with the federal government—was outdated, as it had operated pursuant to the same formula for nearly fifty years.<sup>53</sup> This Article contends that the Court's preoccupation with time primed its conclusion that the formula no longer captured constitutionally cognizable discrimination and that the provision's continuing intrusion on state sovereignty therefore exceeded congressional power.<sup>54</sup>

All of this raises the obvious question of what we can possibly do about racial discrimination given its multidimensionality. Returning to the tragic story in the beginning of this Article, one may wonder

47. See, e.g., *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2642 (2013) (Ginsburg, J., dissenting) ("[T]he Court ignores that 'what's past is prologue.' And '[t]hose who cannot remember the past are condemned to repeat it.' Congress was especially mindful of the need to reinforce the gains already made and to prevent backsliding." (internal citations omitted) (first quoting WILLIAM SHAKESPEARE, *THE TEMPEST* act 2, sc. 1; and then quoting 1 GEORGE SANTAYANA, *THE LIFE OF REASON* 284 (1905))).

48. 109 U.S. 3 (1883).

49. *Id.* at 24; see also Darren Lenard Hutchinson, *Racial Exhaustion*, 86 WASH. U. L. REV. 917, 922 (2009) (describing the Court's early impatience with race-based remedies).

50. See Hutchinson, *supra* note 49, at 922.

51. 133 S. Ct. 2612 (2013).

52. *Id.* at 2631.

53. *Id.* at 2625–31.

54. *Id.* at 2631.

how an adaptive understanding helps to prevent or redress the fatal shooting of an unarmed black teenager by a police officer.

Institutional reform of policing practices is an essential and vital concern, and I do not intend in any way to diminish its significance here. The precepts of adaptive discrimination, however, *also* urge us to explore discrimination's broader dimensions. They suggest that we shift from a singular, transaction-based notion of racial discrimination as a form of individual bias, prejudice, and intolerance, and train additional attention on the sources and persistence of systemic disadvantage.<sup>55</sup> Therefore, while we need to dismantle discriminatory policing practices, we need also to find ways to eliminate the underlying systems that dehumanize black life and create the overarching context for fatal encounters like Michael Brown's.

In sum, adaptive discrimination enables a more complete diagnosis of racial discrimination and encourages us to tackle its full dimensions. In so doing, it helps us to reconcile the obvious disconnect between formal racial progress, on the one hand—as a result of laws that bar intentional discrimination—and the stubborn persistence of vast racial inequality on the other.<sup>56</sup> It explains how we can elect an African-American president and yet still experience voter suppression<sup>57</sup> and disproportionately high unemployment,<sup>58</sup>

55. Cf. FEAGIN, *supra* note 1, at 2–5 (“Traditional approaches do not capture or explain the structural realities of this society’s racial oppression in the past or present.”).

56. See Gary Younge, Editorial, *The Awkward Truth About Race*, THE NATION, June 9, 2014, at 10 (“[W]hen it comes to the goals laid down by the civil rights movement . . . , America is actually going backward. Schools are resegregating, legislation is being gutted, it’s getting harder to vote, large numbers are being deprived of their basic rights through incarceration, and the economic disparities between black and white are growing. In many areas, America is becoming more separate and less equal.”).

57. See Ian Vandewalker & Keith Gunnar Bentele, *Vulnerability in Numbers: Racial Composition of the Electorate, Voter Suppression, and the Voting Rights Act*, 18 HARV. LATINO L. REV. 99, 101–02 (2015); Christopher Ingraham, *New Evidence that Voter ID Laws ‘Skew Democracy’ in Favor of White Republicans*, WASH. POST: WONKBLOG (Feb. 4, 2016) (citing Zoltan Hajnal, Nazita Lajevardi & Lindsay Nielson, *Voter Identification Laws and the Suppression of Minority Votes* (forthcoming 2016), <http://pages.ucsd.edu/~zhajnal/page5/documents/VoterIDLawsandtheSuppressionofMinorityVoters1.pdf> [<https://perma.cc/R3Q9-N68T>]), <https://www.washingtonpost.com/news/wonk/wp/2016/02/04/new-evidence-that-voter-id-laws-skew-democracy-in-favor-of-white-republicans/> [<https://perma.cc/R6LZ-AGES>] (discussing the findings of a forthcoming study conducted by political scientists at the University of California, San Diego and Bucknell University exploring the impact that recently enacted voter identification laws are having on minority voting).

58. See Gillian B. White, *Education Gaps Don’t Fully Explain Why Black Unemployment Is So High*, THE ATLANTIC (Dec. 21, 2015), <http://www.theatlantic.com>

segregation in public schools and housing,<sup>59</sup> and significant bias in our criminal justice system.<sup>60</sup> An adaptive framework enables us to see that racial progress is not inevitable but rather that it ebbs and flows through time.

There is an obvious danger, of course, that we may be easily overwhelmed both by the complexity and density of the problem and the call to respond with solutions that match its persistence and intensity. We might choose instead to resign ourselves to hopelessness and despair. And yet, understanding racial discrimination as an adaptive problem can also be liberating. It suggests that we need not—and, indeed, should not—focus on the search for one magical approach, but rather should pursue a broad range of coordinated strategies. For purposes of law, this means that we should not rely on courts alone, but should look to legislatures and communities to create an ecosystem of sustained racial equality and freedom. This effort would require some meaningful changes in constitutional law, which, as it stands now, prevents courts, legislatures, and other public institutions from fully capitalizing on their institutional and organizational capacities. As I explore a bit further, however, other parts of this project could be pursued at the state and local level, relatively free of these constitutional constraints.

This Article proceeds as follows. Part I is divided into two sections. Section I.A defines adaptive discrimination and locates it in public and private efforts to evade various civil rights mandates. It then explores how a confluence of white privilege, racialized class ideologies, and implicit bias embed in our institutions and structures, producing a continuum of racial inequality that spans generations. Whites' ability to exit antidiscrimination regimes, coupled with the lack of agency that people of color themselves have over subordinating systems and law's assumptions that discrimination naturally ceases to exist over time, further exacerbate the problem. Section I.B gives a concrete account of adaptive discrimination by connecting intergenerational discrimination in St. Louis County to

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/business/archive/2015/12/black-white-unemployment-gap/421497/ [https://perma.cc/X4LU-JP3C].

59. See Erica Frankenberg & Genevieve Siegel-Hawley, *Public Decisions and Private Choices: Reassessing the School-Housing Segregation Link in the Post-Parents Involved Era*, 48 WAKE FOREST L. REV. 397, 414–15 (2013) (noting the role that private interests play in segregating neighborhoods and schools).

60. See DOJ REPORT, *supra* note 5, at 15–89.

present-day discrimination in Ferguson, Missouri, where the fatal shooting discussed in this Article's opening paragraphs occurred.

Part II explores the problem of time in constitutional doctrine and how it subverts an adaptive understanding of racial discrimination. Part III proposes changes to constitutional law that would free federal courts and Congress to craft strategies for curbing adaptive discrimination. This Article concludes by outlining an interactive, community-based enforcement mechanism that might generate more sustainable change. Ultimately, I am hopeful that law can address this problem, but it will require different, more innovative structures than those that we have now.

## I. WHAT IS ADAPTIVE DISCRIMINATION?

### A. *The Elements of Adaptive Discrimination: Systemic, Dynamic, Regenerative*

Adaptive discrimination consists of public and private actions and institutional rules and norms that synergistically regenerate racial inequality across social systems through time. This Section explores racial discrimination's historically cyclical nature: formal bans on intentional discrimination are followed by episodic retrenchment as discrimination is reconstituted in race-neutral forms that more readily escape legal sanction, thus allowing the cycle to start anew.

It is hard to peg this dynamic to a single ideology. Neither racism nor white supremacy—as conscious belief systems motivated by racial animus—fully captures the dynamic I describe here, though I contend that such beliefs have been instrumental to adaptive discrimination. That said, society appears to tolerate significant racial inequality,<sup>61</sup> even as it formally rejects overt racism. We can attribute some of this problem to a constellation of laws, rules, and practices that converge around white privilege norms<sup>62</sup> and racialized class ideologies.<sup>63</sup> Flying below law's radar, these disguised racial practices and belief systems become embedded in our social, economic, and political organizations

61. Glenn C. Loury, *Social Exclusion and Ethnic Groups: The Challenge to Economics*, in ANNUAL WORLD BANK CONFERENCE ON DEVELOPMENT ECONOMICS 1999, at 225, 233, 255 (2000).

62. Cf. Mahoney, *Segregation*, *supra* note 20, at 1661 (“The construction of race in America today allows whiteness to remain a dominant background norm, associated with positive qualities, for white people, and it allows unemployment and underemployment to seem like natural features of black communities.”).

63. See Mahoney, *Class and Status*, *supra* note 21, at 799, 828–29 (discussing a “dynamic view of class, race, and struggle”).

and institutions, producing an equilibrium of lasting racial disadvantage.<sup>64</sup> A growing body of social science indicates that pervasive unconscious bias may also help to explain our high tolerance for vast racial disparities.<sup>65</sup>

The following sections unpack these points further. Below I describe historical examples of evasive strategies that emerged in response to antidiscrimination laws. I then discuss how ostensibly race-neutral belief systems and whites' ability to exit antidiscrimination regimes perpetuate racial subordination across this inherited social landscape.

### 1. Historical Examples of Evasive Strategies

It may be easy to forget that for a brief but critical period in our history blacks enjoyed a significant measure of freedom. During Reconstruction, following the Civil War, blacks sought to establish their autonomy by assuming control of churches, schools, and "benevolent societies," by "staking a claim to economic independence," and by forging their own "distinctive political culture[.]"<sup>66</sup> Some blacks achieved prominent political status during this time<sup>67</sup> and, through significant mobilization, began to "demand[] the full gamut of opportunities and privileges enjoyed by whites."<sup>68</sup>

But this period did not last long. New forms of discrimination took hold as government officials, in concert with private actors, sought to avoid equality mandates.<sup>69</sup> The Supreme Court sanctioned

64. I intend to distinguish the dynamics described here from "path-dependen[t]" behavior in which "an outcome or decision is shaped in specific and systematic ways by the historical path leading to it." Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 604 (2001).

65. See generally Sheryll Cashin, *Shall We Overcome? "Post-Racialism" and Inclusion in the 21st Century*, 1 ALA. C.R. & C.L. L. REV. 31, 34–37, 45–46 (2011) (discussing the role that implicit biases play in political opposition to integration and policies that promote racial equality).

66. ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877*, at 78 (1988).

67. *Id.* at 112–13.

68. *Id.* at 113.

69. See, e.g., *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441–43 (1968); see also DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II*, at 6 (2008) (describing laws and practices that reenslaved African Americans for several decades following Reconstruction). The Court reasoned in *Jones* that

[j]ust as the Black Codes, enacted after the Civil War to restrict the free exercise of those rights, were substitutes for the slave system, so the exclusion of Negroes



the resulting laws and practices through early decisions that gutted the Reconstruction Amendments.<sup>70</sup>

For instance, in *United States v. Cruikshank*,<sup>71</sup> the Court cleared a path for whites to use violence and intimidation against black majorities in the South.<sup>72</sup> The decision enabled whites to seize control of state and local governments in order to protect their class interests as southern planters.<sup>73</sup> In *Cruikshank*'s wake, state and local legislatures passed laws that imposed stringent racial controls on black populations.<sup>74</sup> Southern states also established peonage systems that delivered an estimated 100,000 blacks, charged with manufactured "crimes," into forced labor camps under shockingly brutal conditions.<sup>75</sup> These harsh and inhumane systems—fostered through partnerships between law enforcement and private citizens—continued well into the twentieth century.<sup>76</sup> Thus, for approximately fifty years following the Civil War, government officials and private actors together effectively reconstituted slavery, which had been formally abolished and constitutionally outlawed by the Thirteenth Amendment.<sup>77</sup>

Whites devised other methods for perpetuating racial caste, despite the Reconstruction Amendments' formal guarantee of racial

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from white communities became a substitute for the Black Codes. And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.

*Jones*, 392 U.S. at 441–43.

70. Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1801 (2010) ("The Supreme Court . . . limit[ed] not only the scope of the Reconstruction Amendments but also Congress's powers to enforce them in decisions like *United States v. Cruikshank* and [the] *Civil Rights Cases*.").

71. 92 U.S. 542 (1875).

72. *Id.* at 556–57 (striking indictments of whites who were convicted under the 1870 Enforcement Act for conspiring to intimidate African Americans through murder and racial terror).

73. See James Gray Pope, *Snubbed Landmark: Why United States v. Cruikshank (1876) Belongs at the Heart of the American Constitutional Canon*, 49 HARV. C.R.-C.L. L. REV. 385, 388–89 (2014).

74. See RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 85 (1997) (observing that Black Codes were "[i]ntended to minimize the consequences of the abolition of slavery").

75. See BLACKMON, *supra* note 69, at 7–8 (describing widespread "quasi-slavery" in the twentieth-century South and observing that "the total number of workers caught in this net had to have totaled more than a hundred thousand and perhaps more than twice that figure"); see also Pope, *supra* note 73, at 446.

76. See BLACKMON, *supra* note 69, at 5 (noting "how a form of American slavery persisted into the twentieth century, embraced by the U.S. economic system and abided at all levels of government").

77. *Id.* at 7.

equality. These methods most notably included Jim Crow laws that segregated blacks across almost every conceivable geographic and spatial dimension.<sup>78</sup> The Supreme Court's notorious decision in *Plessy v. Ferguson*,<sup>79</sup> which held that state-mandated segregation did not violate the Constitution's guarantee of equal protection,<sup>80</sup> bolstered these laws.<sup>81</sup> Racial subordination continued to deepen in the latter part of the nineteenth century.<sup>82</sup> Although constitutional protections for African Americans existed in theory, *Cruikshank*, *Plessy*, and other cases placed these subordinating practices beyond law's reach.<sup>83</sup> Thus, the constitutional order itself adapted to accommodate racist practices.<sup>84</sup>

Constitutional law shifted notably in *Brown v. Board of Education*,<sup>85</sup> which struck down de jure segregation in public education.<sup>86</sup> However, southern officials soon organized a campaign of concerted resistance.<sup>87</sup> In Prince Edward County, Virginia, for

78. See Elise C. Boddie, *Racial Territoriality*, 58 UCLA L. REV. 401, 425–34 (2010).

79. 163 U.S. 537 (1896), *overturned by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

80. *Id.* at 550–51.

81. See Michael J. Klarman, *The Plessy Era*, 1998 SUP. CT. REV. 303, 391 (“Even if *Plessy* did not provide a crucial green flag to the spread of racial segregation, one could argue that it legitimized the practice and thus delayed its eventual destruction. On this view, *Plessy* taught the nation that racial segregation comported with the Constitution and therefore, implicitly, was not immoral.”).

82. *Id.* at 309 (describing the subordination of blacks in the latter part of the nineteenth century, including an increase in lynching, black disenfranchisement through literacy tests and poll taxes, the virtual disappearance of integration, the increase in racial disparities in public education, the exclusion of blacks from juries, and the enactment of “restrictive labor control measures” designed to “coerc[e] black agricultural labor”).

83. Indeed, the *Plessy* Court attributed any inferences of black inferiority to misguided assumptions on the part of the “colored race.” *Plessy*, 163 U.S. at 551 (“We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction on it.”).

84. See generally Klarman, *supra* note 81, at 306 (arguing that the Court’s *Plessy*-era decisions reflected both popular opinion and the Justices’ personal views).

85. 347 U.S. 483 (1954).

86. *Id.* at 494–95.

87. See Mark Tushnet, *Public Law Litigation and the Ambiguities of Brown*, 61 FORDHAM L. REV. 23, 24 (1992) (describing various kinds of “resistance,” viz., “passive resistance,” “massive resistance,” and “violent resistance”—all characterizing efforts to evade *Brown*’s mandate—and observing that in the aftermath of *Brown* “some school boards developed elaborate schemes of student assignment in which race was not an explicit ground of decision, but which effectively delayed desegregation for years”); see also, e.g., *Cooper v. Aaron*, 358 U.S. 1, 17 (1958) (asserting that the constitutional right against racial discrimination “can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through

example, local officials flouted *Brown* by closing public schools and funding private, white educational academies with public funds.<sup>88</sup> Districts also adopted formally race-neutral “freedom of choice” plans that allowed blacks and whites to select the schools they wanted to attend—a strategy that, in the grip of whites’ continuing commitments to segregation, was guaranteed to preserve racially isolated schools in the South.<sup>89</sup> Both southern and northern school districts also resorted to residence laws that zoned students to schools in the racially segregated neighborhoods where they lived.<sup>90</sup> Thus, despite *Brown*’s extension of formal constitutional protections, these mechanisms entrenched segregation in public education.<sup>91</sup>

Government officials used other assorted tactics to circumvent integration mandates in the decades after *Brown*, including efforts to preserve residential segregation. One practice was to adopt facially

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evasive schemes for segregation whether attempted ‘ingeniously or ingenuously.’” (quoting *Smith v. Texas*, 311 U.S. 128, 132 (1940)).

88. See *Griffin v. Cty. Sch. Bd.*, 377 U.S. 218, 221 (1964) (discussing the use of public funds to support all-white private schools); see also Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1088 (1978) (“The facts of [*Griffin*] make clear that the county intended to maintain a segregated system of public education, attempting to insulate the program from constitutional scrutiny by disguising it in an ostensibly private form.”). In *Allen v. Wright*, 468 U.S. 737 (1984), *abrogated by* *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014), parents of black public school children sought to require the IRS to enforce its nondiscrimination mandate against tax-exempt private schools. *Id.* at 766 (holding that “respondents’ complaint, which aims at nationwide relief and does not challenge particular identified unlawful IRS actions, alleges no connection between the asserted desegregation injury and the challenged IRS conduct direct enough to overcome the substantial separation of powers barriers to a suit seeking an injunction to reform administrative procedures”); see also Elise C. Boddie, *The Sins of Innocence in Standing Doctrine*, 68 VAND. L. REV. 297, 349–50 (2015).

89. See *Green v. Cty. Sch. Bd.*, 391 U.S. 430, 440–42 (1968) (striking down a “freedom of choice” plan).

90. See MEYER WEINBERG, *RACE AND PLACE: A LEGAL HISTORY OF THE NEIGHBORHOOD SCHOOL* 42–53 (1967) (discussing the racial gerrymandering of attendance zones to perpetuate school segregation); John Leubsdorf, *Completing the Desegregation Remedy*, 57 B.U. L. REV. 39, 45 (1977) (discussing the practice of resorting to neighborhood schools to evade desegregation). This strategy persisted decades after *Brown* and in the North as well. See *Milliken v. Bradley*, 433 U.S. 267, 269 n.1 (1977) (describing the “use of optional attendance zones, racially based transportation of schoolchildren, improper creation and alteration of attendance zones, grade structures, and feeder school patterns” by the Detroit School Board); *City of Yonkers v. U.S. Dep’t of Hous. & Urban Dev.*, 837 F.2d 1181, 1235 (2d Cir. 1987) (concluding that a neighborhood-school policy constituted intentional racial discrimination).

91. See DAVID DANTE TROUTT, *THE PRICE OF PARADISE: THE COSTS OF INEQUALITY AND A VISION FOR A MORE EQUITABLE AMERICA* 105 (2013) [hereinafter *PRICE OF PARADISE*].

race-neutral zoning laws that effectively precluded affordable housing for low-income minorities.<sup>92</sup> In Chicago, city officials blocked racially integrated units by refusing to adhere to land-use procedures that were required for new construction.<sup>93</sup> Another tactic was to manipulate public transportation so that it bypassed routes likely to bring racial minorities into white neighborhoods.<sup>94</sup> In addition, local officials extended their efforts to preserve segregation in government services. In *Palmer v. Thompson*,<sup>95</sup> for instance, the Supreme Court upheld a town's decision to close its public pools after segregation in municipal facilities was declared unconstitutional.<sup>96</sup> The town conceded that an earlier desegregation order had motivated its initial decision, but insisted that safety and economic concerns about integrated pools justified its refusal to reopen them.<sup>97</sup>

In the employment arena, employers resorted to various adaptive strategies shortly after civil rights laws banned intentional discrimination. These strategies included “intelligence and comprehension” tests as screening devices for both hiring and promotion.<sup>98</sup> These measures did not openly discriminate on the basis

92. See generally Josh Whitehead, Note, *Using Disparate Impact to Strike Down Exclusionary Zoning Codes*, 33 REAL EST. L.J. 359 (2005) (describing the pervasive use of zoning codes that have a racially exclusionary impact).

93. See, e.g., *Gautreaux v. Chi. Hous. Auth.*, 503 F.2d 930, 932 (7th Cir. 1974) (observing that district court orders mandating affirmative remedies for intentional housing segregation were “ignored and frustrated” over an “eight year tortuous course” and describing a certain “callousness” of the defendants “towards the rights of the black, underprivileged citizens of Chicago that is beyond comprehension”); cf. *Spallone v. United States*, 493 U.S. 265, 279–80 (1990) (imposing sanctions on the City of Yonkers for its refusal to pass an ordinance that would allow affordable housing to be sited outside predominantly minority areas).

94. See ROTHSTEIN, *supra* note 6, at 27–30. But cf. *Sch. Dist. v. Missouri*, 460 F. Supp. 421, 444 (W.D. Mo. 1978) (concluding that the alleged use of transportation schemes to promote residential segregation was a cognizable litigation theory), *dismissed*, 592 F.2d 493 (8th Cir. 1979), *aff'd sub nom.* *Black v. Missouri*, 492 F. Supp. 848 (W.D. Mo. 1980).

95. 403 U.S. 217 (1971).

96. *Id.* at 226–27.

97. See Brest, *Legislative Motive*, *supra* note 42, at 97.

98. See David J. Garrow, *Toward a Definitive History of Griggs v. Duke Power Co.*, 67 VAND. L. REV. 197, 212–13 (2014) (explaining that, according to civil rights attorneys at the time, “intelligence tests and seniority provisions were ‘the most frequently used means of discrimination against minority-group workers’”); cf., e.g., Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69, 82 (2011) (“In the first decades after Title VII’s enactment, the courts were constantly considering how to shape the law to handle new understandings of how discrimination occurs. Since the late 1980s, however, the courts have appeared reluctant to adapt discrimination law, despite a growing literature suggesting a more complex view of discrimination and its motivations, as well as changes occurring in the workplace.”).

of race. However, as the Supreme Court recognized in *Griggs v. Duke Power Co.*,<sup>99</sup> they achieved the same discriminatory impact, given the severe historical deficits in blacks' educational opportunities.<sup>100</sup> Employers also continued to rely on seniority systems that froze in place the effects of prior facial discrimination, leading one judge to observe that "[j]ob seniority, embodying as it does, the racially determined effects of a biased past, constitutes a form of present racial discrimination."<sup>101</sup>

Adaptive discrimination also persisted in voting.<sup>102</sup> Government officials for generations have resorted to "ingenious" schemes for disfranchising racial minorities.<sup>103</sup> After laws were enacted that barred intentional discrimination, state and local officials concocted new methods, such as at-large voting and annexation strategies, to weaken minority voting power.<sup>104</sup> Indeed, the problem was so persistent that Congress passed the Voting Rights Act in 1965, which included a provision requiring jurisdictions with a history of repeated racial discrimination to pre-clear any voting changes with the federal government.<sup>105</sup> Examples of adaptive discrimination in voting occurred in the wake of the 2008 and 2012 presidential elections that led to the election and reelection of President Obama. Following

99. 401 U.S. 424 (1971).

100. See *id.* at 426–28 (discussing the shift from overtly discriminatory policy just "prior to July 2, 1965, the effective date of the Civil Rights Act of 1964," to a new policy after the effective date for new hires); *id.* at 428 ("Neither [of the tests] was directed or intended to measure the ability to learn to perform a particular job or category of jobs."). Following the enactment of the 1964 Act and the EEOC complaint that gave rise to the litigation, Duke Power continued to maintain segregation at its plant. See Garrow, *supra* note 98, at 208–09 (describing the segregative practices and the failure of plant employees to cooperate with the EEOC investigation).

101. See Garrow, *supra* note 98, at 214. Although some judges recognized these "freezing effect[s]" as intentional discrimination, they eventually retreated and began to couch them in terms of racial impact. *Id.* at 215 n.109 (describing one Fifth Circuit judge's apparent shift from describing the "freezing effect" as a form of intentional discrimination to "tellingly eliminat[ing] any invocation of purpose" when he described such effects in a later opinion). But see *In re Birmingham Reverse Discrimination Emp't Litig.*, 20 F.3d 1525, 1541 (11th Cir. 1994) (upholding affirmative action plan on the remedial theory that past hiring practices had produced an "adverse impact on blacks").

102. See *Giles v. Harris*, 189 U.S. 475, 488 (1903) (observing that constitutional rights alone will not protect African Americans from "the great mass of the white population [that] intends to keep the blacks from voting").

103. See *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966), *abrogated by* *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013); ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 91–92 (rev. ed. 2009); MINORITY VOTE DILUTION 1–27 (Chandler Davidson ed., 1989).

104. See *infra* Part II.

105. See *infra* Part II.

these elections, Republican-leaning states passed laws requiring photo identification in order to vote,<sup>106</sup> with the purpose in some cases of preventing racial minorities,<sup>107</sup> among other Democratic-leaning constituencies, such as college students, from participating in the democratic process.<sup>108</sup>

The criminal justice system has also undermined civil rights successes and racial justice reforms.<sup>109</sup> For example, as the civil rights movement gained ground during the 1960s, police throughout the country began to target law enforcement efforts at inner-city blacks.<sup>110</sup> By 1967, the practice of stopping and frisking blacks “had become such a pervasive experience” that the President’s Commission on Law Enforcement and the Administration of Justice publicly warned

106. See Editorial, *North Carolina’s Voting Law Goes on Trial*, N.Y. TIMES, July 15, 2015, at A26 (describing the state’s voter identification law as “a pile of blatantly discriminatory measures that lawmakers knew would make voting harder, if not impossible, for many lower-income citizens—who are disproportionately black and Latino, and many of whom tend to vote Democratic”); *Voter ID History*, NAT’L CONF. ST. LEGISLATURES (Jan. 4, 2016), <http://www.ncsl.org/research/elections-and-campaigns/voter-id-history.aspx> [<http://perma.cc/5VA3-8WEF>].

107. See Deuel Ross, *Pouring Old Poison into New Bottles: How Discretion and the Discriminatory Administration of Voter ID Laws Recreate Literacy Tests*, 45 COLUM. HUM. RTS. L. REV. 362, 380 (2014) (“Most tellingly, officials who supported voter ID laws or laws restricting early voting as purported anti-fraud measures recently either admitted that these laws in fact served racially discriminatory purposes or were exposed as purposefully callous to the laws’ discriminatory effects.”).

108. See Albert R. Hunt, *The Battle to Protect Voting Rights*, N.Y. TIMES (May 4, 2014), [http://www.nytimes.com/2014/05/05/us/politics/the-battle-to-protect-voting-rights.html?\\_r=0](http://www.nytimes.com/2014/05/05/us/politics/the-battle-to-protect-voting-rights.html?_r=0) [<https://perma.cc/2L38-W7FM>]; see also Ingraham, *supra* note 57 (citing Hajnal et al., *supra* note 57) (observing that “[m]ost of the strictest ID laws” were passed after the 2008 elections and discussing forthcoming political science scholarship by researchers at the University of California, San Diego and Bucknell University that identifies “substantial drops in turnout for minorities” under these laws, even when controlling for other factors).

109. See ALEXANDER, *supra* note 13, at 7–8, 21 (contending that the criminal justice system emerged as another form of “social control” to replace the newly retired systems of overt discrimination); see also Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1026 (2010) (“Sociologists and political scientists have recently persuasively argued that the rise of mass imprisonment reflects a backlash against the civil rights movement.”); cf. KENNEDY, *supra* note 74, at 76–135 (discussing the history of discriminatory law enforcement against blacks from slavery through the modern era).

110. See ALEXANDER, *supra* note 13, at 7 (observing that incarceration rates “quadrupled” between 1960 and 1990); see also Donna Murch, *Ferguson’s Inheritance*, JACOBIN MAG. (Aug. 5, 2015), <http://www.jacobinmag.com/2015/08/ferguson-police-black-lives-matter/> [<https://perma.cc/83LN-PB2B>] (observing that heavy-handed policing strategies emerged in response to radical black activism during the late 1960s and early 1970s).

about the consequences of these “aggressive” patrol tactics.<sup>111</sup> Hostility between the police and black residents soon escalated and was “the precipitating factor” in several major urban riots.<sup>112</sup>

The rise of mass incarceration further eroded civil rights progress by destabilizing urban communities. The “war on drugs” ensnared countless African Americans in the criminal justice system at significantly higher rates than whites,<sup>113</sup> at a time when drug crimes as a whole were declining.<sup>114</sup> Felon disfranchisement laws and, in some states, the use of gerrymandering techniques that treat prisoners as residents of the prison’s jurisdiction, rather than as residents of their home communities, continue to undermine African Americans’ political power and leverage.<sup>115</sup>

In sum, across the civil rights spectrum new policies and practices have emerged in place of conventionally racist practices now barred by law. Public officials and private actors have skirted social norms condemning outright discrimination and have adopted new rules that in effect, and by design, reconstitute old patterns of racial subordination. The breadth of the problem—which runs the institutional gamut, from education and employment to housing, voting, and criminal justice—shows how private and public conduct feed and reinforce adaptive discrimination across a vast and interconnected social system. These practices are both dynamic, as

111. Lewis R. Katz, *Terry v. Ohio at Thirty-Five: A Revisionist View*, 74 MISS. L.J. 423, 460–61 n.152 (2004); *see also* Farrakhan v. Gregoire, 590 F.3d 989, 994–95 (9th Cir.) (discussing police practices of targeting black neighborhoods), *aff’d on reh’g*, 623 F.3d 990, 993–94 (9th Cir. 2010) (en banc) (per curiam).

112. *See* Katz, *supra* note 111, at 436–37 n.77 (“Hostility between blacks and police was a major factor—indeed, sometimes the precipitating factor—in several [urban] riots [of the 1960s].”).

113. *See* ALEXANDER, *supra* note 13, at 7 (“In some states, Black men have been admitted to prison on drug charges at rates twenty to fifty times greater than those of White men.”). Studies discredit the notion that the sale and use of drugs explains the outcome. *Id.*; *see also, e.g.*, 1 LLOYD D. JOHNSTON ET AL., U.S. DEP’T OF HEALTH & HUMAN SERVS., NIH PUB. NO. 07-6205, MONITORING THE FUTURE: NATIONAL SURVEY RESULTS ON DRUG USE, 1975–2006, at 32 (2007), [http://www.namonitoringthefuture.org/pubs/monographs/vol1\\_2006.pdf](http://www.namonitoringthefuture.org/pubs/monographs/vol1_2006.pdf) [<https://perma.cc/BAK4-QMTF>] (“African-American 12th graders have consistently shown lower usage rates than White 12th graders for most drugs, both licit and illicit.”).

114. *See* ALEXANDER, *supra* note 13, at 7.

115. *See id.* at 6 (discussing racial dimensions of mass incarceration); *see also* Little v. LATFOR, No. 2310/2011, at 8–10 (N.Y. Sup. Ct. Dec. 1, 2011) (upholding a New York prison-based gerrymandering scheme as constitutional); Taja-Nia Y. Henderson, *The Ironic Promise of the Thirteenth Amendment for Offender Anti-Discrimination Law*, 17 LEWIS & CLARK L. REV. 1141, 1148–49 (2013) (discussing the “cumulative ramifications of discrimination” against ex-offenders).

they change to accommodate new legal rules, and regenerative, as they continuously re-create and sustain racial hierarchy.

## 2. White Privilege Norms, Racialized Class Ideologies, and Implicit Racial Bias

The previous Section described discriminatory social practices that have survived by evading antidiscrimination law and equality mandates. Here, I explore the dynamics of this process in greater depth to explain how discrimination persists despite formal bans on intentional discrimination and antiracist social norms.<sup>116</sup> This inquiry first requires that we probe the nature of white privilege and racialized ideologies of class. When mapped onto our inherited landscapes, these hidden social systems both perpetuate and obscure racial inequality. Because they operate in the background, beyond our conscious awareness,<sup>117</sup> they limit our ability to see and, therefore, to define, the problem. In so doing, they facilitate adaptive discrimination.

Martha Mahoney and Peggy McIntosh collectively describe “white privilege” as “‘an invisible weightless knapsack’ of provisions, maps, guides, codebooks, passports, visas, compasses, and blank checks.”<sup>118</sup> As Mahoney argues, this privilege “facilitates mobility and comfort in ordinary life,” the routine benefits of which are invisible to whites.<sup>119</sup> “Whiteness” here refers to “a ‘standpoint’ from which [white] people look at [themselves], at others, and at society; and a set of cultural practices that are usually unmarked and unnamed.”<sup>120</sup> Within this framework, whiteness becomes raceless. As the dominant norm, it has no “impact”<sup>121</sup> because it defines and, therefore, prescribes the natural state of affairs. White privilege thus

116. See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 323 (1987) (observing that society “rejects racism as immoral”).

117. Cashin, *supra* note 65, at 34 (“A large body of evidence from experimental psychology demonstrates unconscious bias on the part of whites and minorities against racial minorities, especially African-Americans. This is in contrast to a dramatic reduction in explicit (reported) bias.”).

118. Mahoney, *Segregation*, *supra* note 20, at 1665 (citing Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women’s Studies* 1–2 (Wellesley Coll., Ctr. for Research on Women, Working Paper No. 189, 1988)); see also Cashin, *supra* note 65, at 34.

119. Mahoney, *Segregation*, *supra* note 20, at 1665. Mahoney writes that “[w]hite privilege . . . includes the ability to not-see whiteness and its privileges.” *Id.* at 1666.

120. *Id.* at 1664.

121. *Id.* at 1666.



fosters adaptive discrimination because it conceals how race operates in society. Practices that reinforce whiteness norms are not deemed discriminatory because they merely reinforce the accepted, established order.

Take residential segregation, which has persisted for generations despite civil rights laws that ban intentional discrimination in the housing market.<sup>122</sup> Under these laws, it is unlawful to refuse to sell or rent a home to an African American because of race. Society also formally condemns such practices.<sup>123</sup>

But let us assume that a predominantly white town adopts a zoning law that effectively prohibits low-income housing. As a result, African Americans, who are disproportionately poor, are less likely to move into the town. Let us further assume that a group of African-American plaintiffs sues the town for racial discrimination. Absent factors that suggest a racial motive, an equal protection claim is unlikely to succeed.<sup>124</sup> Indeed, many people may not regard the zoning law as racially discriminatory, even though it effectively preserves the whiteness of the neighborhood itself.<sup>125</sup> White residents may even be offended that the town has been accused of racial discrimination. The assertion is troubling because it requires whites to perceive and to acknowledge both their whiteness and white privilege.<sup>126</sup> It intrudes upon a state of affairs that they regard (however unconsciously) as natural and, therefore, unobjectionable.

It is possible that the plaintiffs here could ultimately prevail on a statutory claim that prohibits policies and practices adversely

122. See Ford, *supra* note 19, at 1849–57.

123. See Lawrence, *supra* note 116, at 323.

124. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977).

125. For an account of how advantages of neighborhood, wealth, social networks, and higher-education admissions can reproduce in the absence of intentional discrimination, see ROITHMAYR, *supra* note 19, at 60–81.

126. As Mahoney observes, in this context many whites may not even notice that their neighborhoods are entirely white because they are “part of the ‘natural’ world, helping to keep their whiteness unnoticed and undisturbed, and helping to equate whiteness with something that reflects positive values and feels like home.” Mahoney, *Segregation*, *supra* note 20, at 1664. In this respect, whites are also unlikely to perceive the whiteness of their neighborhood as the legacy of prior government practices that required, and then facilitated, segregation. See KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 18 (1987); Barbara J. Flagg, “*Was Blind, but Now I See*”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 976, 982 (1993).

affecting people of color.<sup>127</sup> But it is far from clear that this kind of claim carries the same social stigma as a claim for intentional racial discrimination.<sup>128</sup> As already indicated, the claim readily lends itself to class-based, rather than race-based, justifications. White residents may disclaim racial bias by contending that the law does not target people of color, but rather only precludes low-income people from living in the neighborhood, an outcome that is more socially acceptable.<sup>129</sup> Blacks have not been excluded from the neighborhood because of their race—the response goes—but simply because they do not have the income or wealth to buy a house in the area. The real problem, therefore, is disparate class resources. With class at the fore of the narrative and with its racial dimensions now obscured, white residents can comfortably defend their neighborhood as one that only “happens-to-be-white,” rather than one that is intentionally white. In this way, the whiteness of the neighborhood retains its legitimacy under the law and its immunity from social sanction.<sup>130</sup>

These racialized class ideologies—which are explicitly associated with class, but correlate with race—foster adaptive discrimination.<sup>131</sup> Race is operative because these ideologies often have a disproportionately adverse racial impact, though not necessarily in ways that are detectible by law or by our social radar.<sup>132</sup> The zoning

127. Such a zoning law may violate the Fair Housing Act under a “disparate impact” theory of liability. *See* Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507, 2525–26 (2015).

128. *Cf.* Mahoney, *Class and Status*, *supra* note 21, at 801 (describing efforts to assert class in order to avoid discussions of racial inequality).

129. *Id.*; *cf.* Mahoney, *Segregation*, *supra* note 20, at 1667–68 (observing how white “elites” manipulate racial narratives to blame less-elite whites for racism, while “exonerat[ing] [themselves] from responsibility for the reproduction of racial power and subordination”).

130. We could complicate the hypothetical to show that white residents approved the zoning law out of a desire to preclude *poor blacks*—not necessarily poor whites—from moving in. Indeed, studies indicate that low-income whites on average live in wealthier neighborhoods than *middle-class* blacks, suggesting that class itself is racialized. *See* Tami Luhby, *Middle Class Whites Live in Nicer Neighborhoods Than Blacks*, CNN MONEY (June 26, 2015), <http://money.cnn.com/2015/06/26/news/economy/middle-class-neighborhoods/> [<https://perma.cc/TJ74-U2UJ>] (reviewing a study conducted by the Stanford Graduate School of Education).

131. *See* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1360–64, 1369–81, 1384 (1988) (observing that “until the distinct racial nature of class ideology is [] revealed and debunked, nothing can be done about the underlying structural problems that account for the disparities”).

132. *See generally* United States v. City of Black Jack, 508 F.2d 1179, 1185–86 (8th Cir. 1974) (explaining that a plaintiff can establish a rebuttable presumption of a valid Title

law disproportionately isolates and contains blacks, but constitutional law privileges and legitimizes the class-based explanation and therefore insulates its racial dimensions from scrutiny. Even an otherwise successful statutory claim, brought under the disparate impact theory alluded to above, may run into constitutional trouble if it advances an explicit racial remedy.<sup>133</sup> As a result, the constitutional narrative disguises these racial dynamics, even as it tolerates their racial effects, allowing them to fester and to corrode equality.

Pervasive implicit racial bias further complicates the problem, as it generates racial reactions that may be unknown even to the individual who harbors them.<sup>134</sup> As Charles Lawrence has explained, this lack of awareness can be traced to cognitive processes that refuse to acknowledge “ideas, wishes, and beliefs that conflict with what the individual has learned is good or right.”<sup>135</sup> People cannot detect their racial bias because their minds have blocked their ability to recognize it.<sup>136</sup> The social dominance of widely accepted “beliefs and preferences” about African Americans and other people of color further obscures their racial dimensions.<sup>137</sup> Identifying and labeling these beliefs is more difficult when they function as “part of the individual’s rational ordering of her perceptions of the world[.]”<sup>138</sup> rather than being understood as an explicit choice about what to think and how to act. This disconnect between an individual’s hidden understandings and sociocultural norms on the one hand, and the racialized impact of on-the-ground practices on the other, helps to perpetuate the status quo. If we cannot recognize the problem, we cannot begin to address it.

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VIII disparate impact claim based on a showing of discriminatory effect where a city justified a discriminatory zoning ordinance on the grounds that dispersed low-income housing would devalue neighboring homes).

133. See *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2512 (2015) (“Remedial orders that impose racial targets or quotas might raise difficult constitutional questions.”).

134. See generally MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, *BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE* (2013) (observing that many people harbor hidden biases of which they are unaware); Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 468–90 (2010) (discussing peer-reviewed studies that document the prevalence of implicit bias).

135. See Lawrence, *supra* note 116, at 322 (discussing a Freudian rationale “for the unconscious nature of . . . racially discriminatory beliefs and ideas”).

136. See *id.* at 322–23 (observing that “while our historical experience has made racism an integral part of our culture, our society has more recently embraced an ideal that rejects racism as immoral”).

137. See *id.* at 323.

138. *Id.*

### 3. The Ability to Exit Antidiscrimination Regimes

The previous Section explored how inherently discriminatory individual and sociocultural beliefs, disguised as racially neutral adherence to the status quo, perpetuate racially unequal outcomes. This Section assembles these discrete observations to make explicit a core aspect of adaptive discrimination—whites' ability to "exit" or withdraw from antidiscrimination or equality-oriented regimes<sup>139</sup> by resorting to alternatives outside the "official system."<sup>140</sup> As indicated above, these alternatives can include private schooling arrangements and changes in hiring and promotion techniques, policing and law enforcement practices, and methods for qualifying voters that avoid antidiscrimination mandates.

These insights draw on Marc Galanter's seminal article about the dynamics in our legal system that favor the "haves" (over the "have-nots").<sup>141</sup> Galanter identified features of the "architecture of the legal system" that limit law's use as a tool for redistributive social change.<sup>142</sup> One important feature of this architecture is the ability of those with resources to opt out of social systems that no longer serve their needs or satisfy their preferences and to opt *into* alternative institutional arrangements that allow them to pursue their goals using different means.

In an adaptive context, whites' capacity to exit antidiscrimination regimes increases as alternative institutional structures and partners become available and as "the costs of withdrawal, transfer, relocation, development of new relationships, [and] the pull of loyalty to previous arrangements" diminish.<sup>143</sup> As indicated above, exiting integrated institutions is relatively costless for whites due to belief systems, norms, behaviors, and latent biases that tolerate, or at least fail to stigmatize, the resulting racial inequality.

Take the example of public school integration. Although research shows that whites have become more accepting of

139. See Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 124 (1974); cf. Paul C. Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 629–30 (1983) (noting that "[w]hites who object to integration in a city's public schools and who have the flexibility and the resources may decide to 'flee' by sending their children to private schools or by choosing to live in another community").

140. See Gewirtz, *supra* note 139, at 629–30; see also Galanter, *supra* note 139, at 124–35.

141. See Galanter, *supra* note 139, at 136–51.

142. *Id.* at 149.

143. *Id.* at 126.

integration over time, the same research shows that they are still generally uncomfortable with it.<sup>144</sup> Whites are more inclined to leave a public school as the number of “nonwhite” children in the school increases.<sup>145</sup> Indeed, “white flight” from integrating public schools has long been a barrier to school integration.<sup>146</sup>

However, whites can only leave a racially integrated school if they have an alternative school to attend. Private schools, charter schools, and public schools in predominantly white school districts provide white parents with options for avoiding integration. As discussed in Part II, law enables whites to “exit” public school integration by protecting their decision to exercise choice over these and other alternative educational environments.<sup>147</sup>

At the same time, the social and emotional costs of equality mandates can be high if they require whites to confront white privilege, to acknowledge the racialized dimensions of class that preserve such privilege, and to identify biases that linger beneath their conscious awareness. As a result, whites may more readily resort to systems that operate according to “parochial norms and concerns” outside the bounds of antidiscrimination law, including the right to exclude persons of perceived “low status.”<sup>148</sup> In the context of school integration, this can lead whites to identify concerns, such as

144. See Camille Zubrinsky Charles, *Can We Live Together? Racial Preferences and Neighborhood Outcomes*, in *THE GEOGRAPHY OF OPPORTUNITY* 45, 56 (Xavier de Souza Briggs ed., 2005).

145. See Kimberly Goyette, *Setting the Context* (“More recent research on the effects of school choice on school segregation finds that the proportion of nonwhite students in public schools affects the likelihood of white enrollment in private, charter, and magnet schools, even when controlling for measures of school quality, including graduation rates, test scores, safety, and student-teacher ratios.”), in *CHOOSING HOMES, CHOOSING SCHOOLS* 1, 8–9 (Annette Lareau & Kimberly Goyette eds., 2014).

146. See Janelle Scott, *School Choice as a Civil Right: The Political Construction of a Claim and Its Implications for School Desegregation* (“During the civil rights movement, choice became a controversial and popular tool for policy makers who wished to defy *Brown*’s mandate to desegregate public schools by providing ‘multiple escape routes’ for white students.”), in *INTEGRATING SCHOOLS IN A CHANGING SOCIETY* 32, 37 (2011); see also, e.g., *Allen v. Wright*, 468 U.S. 737, 753 (1984) (rejecting a challenge by the parents of black school children linking the integration of public schools to the failure of the IRS to deny tax exemptions to racially discriminatory public schools), *abrogated by* *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014); Gewirtz, *supra* note 139, at 629–30.

147. See *infra* Part II.

148. See, e.g., Klint Alexander & Kern Alexander, *Vouchers and the Privatization of American Education: Justifying Racial Resegregation from Brown to Zelman*, 2004 U. ILL. L. REV. 1131, 1137–41 (discussing the historical use of school vouchers to enable whites to escape the mandate to integrate under *Brown*); cf. Galanter, *supra* note 139, at 146.

perception of a school's level of "safety," that are not (explicitly) racial in order to avoid appearances of racial bias.<sup>149</sup>

These antidiscrimination mandates, in other words, seek to reconfigure systems that entrench inequality. Yet, the call to shift from a status quo that feels natural, ordinary, and customary, to circumstances that are different and uncomfortable, incentivizes exit.<sup>150</sup> Whites who fear difference have both opportunity and motive, both individually and as a group, to adopt behaviors and policies that allow them to opt out of equality mandates, free from either social or legal censure.

#### 4. The Problems of Agency and Time

Two additional points warrant mention here, as they further illustrate how our social and legal understandings fail to cohere with the realities of racial discrimination.

The first of these issues concerns agency. Adaptive discrimination presumes that racially subordinated people have very little, if any, agency or control over the dynamic systems that perpetuate racial inequality. For many, this idea will seem fundamentally antithetical to America's individualist ethos.<sup>151</sup> The notion that anyone lacks control over her environment may make little sense. To see why this intuition misses the mark in the race context, however, requires a practical understanding of the powerful forces that are often arrayed against people of color.<sup>152</sup>

We can return to the earlier example of the predominantly white town that has passed a zoning ordinance precluding affordable housing. Once again, chances are that an African American will have a harder time buying into or renting in the town because she is more

149. *This American Life: The Problem We All Live With*, CHI. PUB. RADIO (July 31, 2015), <http://m.thisamericanlife.org/radio-archives/episode/562/the-problem-we-all-live-with> [http://perma.cc/7W7Y-YCCF] (reporting on white parents' opposition to integration under the auspices of "school safety" in a predominantly white town in Missouri).

150. Indeed, Galanter posits that groups resort to law precisely because they are excluded from the system of relationships that might allow them to redress their grievances privately. See Galanter, *supra* note 139, at 130 ("[T]he more inclusive in life-space and temporal span a relationship between parties, the less likely it is that those parties will resort to the official [legal] system and more likely that the relationship will be regulated by some independent 'private' system."); see also, e.g., Alexander & Alexander, *supra* note 148, at 1137–41.

151. Cf. Tracy E. Higgins & Laura A. Rosenbury, *Agency, Equality, and Antidiscrimination Law*, 85 CORNELL L. REV. 1194, 1194–98 (2000) (discussing the presumption that individual exercises agency over discrimination).

152. See ROTHSTEIN, *supra* note 6, at 4.

likely to be lower income.<sup>153</sup> She also likely has far less wealth (which she might otherwise use to supplement her low income) than whites in the town,<sup>154</sup> increasing the improbability of such a move. If she grew up in a racially segregated school district, there is a good chance that she will have trouble finding the kind of decent-paying job that would eventually enable her to move into the town.<sup>155</sup> If she lives in an urban environment, it may be more difficult for her to leave, given the array of social, environmental, and economic factors that degrade her choices and opportunities.<sup>156</sup> In short, she is trapped at almost every turn by a system that denies her upward mobility and access to a better life.<sup>157</sup>

These racial dynamics point to a central problem that underlies adaptive discrimination: “the structure of the system gives rise to its behavior.”<sup>158</sup> This means that the choices exercised by people within the system are shaped by the system itself and that even people who may be very different from each other will still “behave in similar ways.”<sup>159</sup> Understanding these dynamics helps us to resist the problem

153. See PATRICK SHARKEY, *STUCK IN PLACE: URBAN NEIGHBORHOODS AND THE END OF PROGRESS TOWARD RACIAL EQUALITY* 4 (2013) (observing that at the end of the 2000s approximately seventy-eight percent of African Americans “were in the bottom three-fifths of the non-immigrant income distribution” in the United States).

154. *Id.* at 112 (noting that “African Americans still have 40 percent less wealth” than whites after “adjusting for parents’ education, income, and occupation”); see also HEATHER BETH JOHNSON, *THE AMERICAN DREAM AND THE POWER OF WEALTH: CHOOSING SCHOOLS AND INHERITING INEQUALITY IN THE LAND OF OPPORTUNITY* 1–9 (2006); ROITHMAYR, *supra* note 19, at 67 (“Residents of segregated neighborhoods own smaller and older properties worth much less, and accordingly are far less likely to pass down money for a college education or a housing down payment to the next generation.”).

155. See ERICA FRANKENBERG, CHUNGMEI LEE & GARY ORFIELD, CIVIL RIGHTS PROJECT, *A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM?* 5 (2003), <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/a-multiracial-society-with-segregated-schools-are-we-losing-the-dream/frankenberg-multiracial-society-losing-the-dream.pdf> [<http://perma.cc/R22Y-V3MH>] (describing “apartheid schools”—intensely segregated schools with “enormous poverty, limited resources, and social and health problems of many types”—that “educate one-sixth of the nation’s black students and one-fourth of black students in the Northeast and Midwest”); ROITHMAYR, *supra* note 19, at 65 (discussing the employment advantages of (predominantly white) wealthy parents who “pass on” employment opportunities to their children).

156. See SHARKEY, *supra* note 153, at 2–5, 180.

157. The consequences of this severely depressed opportunity are intergenerational. See *id.* at 2 (“It is common to hear about the continuing expansion of the black middle class . . . [but] while there is a slightly greater presence of African Americans in the middle and the high ends of the income distribution, a close look at the data shows that the overall level of economic advancement among African Americans [since the beginning of the 1970s] has been remarkably limited.”).

158. See Sterman, *System Dynamics Modeling*, *supra* note 10, at 16.

159. *Id.*

of “fundamental attribution error.”<sup>160</sup> This problem refers to the mistaken judgments that arise when system participants fail to take account of how systems structure human responses.<sup>161</sup> We attribute these responses to “dispositional rather than situational factors[,]” and to “character flaws . . . rather than to the system in which the[] people are embedded.”<sup>162</sup> Our protagonist in the preceding paragraph is no less hardworking or innately capable than the white residents of the town, but her freedom to make different choices has been severely constrained due to factors beyond her control that have accumulated and regenerated for decades.<sup>163</sup>

We might draw on the same insights to explain whites’ preferences for predominantly white neighborhoods, which were described earlier. One view is that these preferences are “dispositional”—that is, that whites somehow innately prefer all-white environments.<sup>164</sup> Alternatively, we can view these preferences as “situational,”<sup>165</sup> meaning that whites have been conditioned to avoid blacks as a result of policies and practices handed down over a period of several hundred years. The perception that whites are inherently racist is a fundamental attribution error, because it fails to consider that they too are a product of the social environment, historical context, and overarching structure of racial discrimination.

The difference between dispositional and situational explanations may lead us to more optimistic conclusions about adaptive discrimination and the possibilities for addressing it, which I turn to briefly in Part III. On the former view, there may not be much that law can do to change whites’ “predisposition” to oppose integration, especially if that predisposition is reinforced by other component parts of a pervasively discriminatory system. The latter view, however, suggests that we might change whites’ receptivity to

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160. *Id.*

161. *Id.* (“A fundamental principle of system dynamics states that the structure of the system gives rise to its behavior.”).

162. *Id.*; cf. Gary Blasi & John T. Jost, *System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice*, 94 CALIF. L. REV. 1119, 1124 (2006) (discussing how people adapt to subordination).

163. See Crenshaw, *supra* note 131, at 1357 (“Black people do not create their oppressive worlds moment to moment but rather are coerced into living in worlds created and maintained by others.”).

164. Sterman, *System Dynamics Modeling*, *supra* note 10, at 16 (“[P]eople have a strong tendency to attribute the behavior of others to dispositional rather than situational factors—that is, to character (and, in particular, character flaws) rather than to the system in which these people are embedded.”).

165. *Id.*



integration if we could just get them to try it by altering the underlying structural context.

The second issue relevant to an understanding of adaptive discrimination concerns the heuristic of time. Our human tendency is to favor simplistic solutions to multifaceted problems and then to judge the success (or failure) of these solutions prematurely.<sup>166</sup> Yet these cognitive shortcuts can lead us to ignore the fluidity and complexity of our predicaments<sup>167</sup> and to overlook the problem of time lags that inhere in adaptive discrimination due to active and passive resistance to antidiscrimination mandates.<sup>168</sup> Accordingly, we presume that racial discrimination necessarily subsides with time,<sup>169</sup> which in turn generates unrealistic expectations about what can be achieved within a limited time horizon. Because we have yet to learn these lessons, we are often deceived by the passage of time in the context of race.

To understand this point better, we can analogize racial discrimination to human disease. Let us say we have a rash. When we apply medication to our rash, we expect that it will heal with time. But what if the rash really is a symptom of a more systemic malady, such as cancer, that has spread throughout the body? Time can only “heal” the wound if we have correctly diagnosed the problem and applied the correct medication for a long enough period to treat the underlying condition. This might require that we change the medication as the disease itself spreads and assumes different forms. In other words, we cannot depend on time alone to tell us whether we are cured. Time does not inevitably lead to improvement if we misunderstand the problem. In fact, if anything, time can exacerbate the problem if we leave the malady untreated.

Understanding both the role that dynamic systems play in structuring individual behavior and the limits of time as a proxy for

166. Sterman, *Climate Change*, *supra* note 44, at 816–17 (discussing how misconceptions of time lead to miscalculations in fashioning remedies).

167. See Sterman, *System Dynamics Modeling*, *supra* note 10, at 16 (“The heuristics we use to judge causal relationships systematically lead to cognitive maps that ignore feedbacks, nonlinearities, time delays, and other elements of dynamic complexity.”).

168. Cf. *id.* at 12 tbl.2 (“In complex systems cause and effect are distant in time and space while we tend to look for causes near the events we seek to explain. Our attention is drawn to the symptoms of difficulty rather than the underlying cause. High leverage policies are often not obvious.”).

169. See FEAGIN, *supra* note 1, at 5 (critiquing the scholarly approach that “typically views the race problem as not foundational to society, but as temporary and gradually disappearing as a result perhaps of increasing modernity”).

racial progress deepens our understanding of racial discrimination. Actuated through events set in motion long ago, discrimination can surface in new places and forms and may breed consequences that are not perceived for years, even generations. As a result, the true impact of racial discrimination—and the remedies that we design to redress it—may take some time to fully unfold. Appreciating the many dimensions of this problem requires that we reformulate our assumptions about how long it takes to dislodge discrimination that has been hardwired over generations. This in turn requires that we adapt our time horizons for realizing meaningful social change. We have to match the dynamic complexity of racial discrimination with systemic responses that are equally dynamic and adaptive.

As Part II explains below, constitutional doctrine consistently misdiagnoses the problem of racial discrimination. Its heavy reliance on time as a proxy leads courts to terminate remedial measures prematurely on the assumption that they have outlived their usefulness. Because judges presume that racial discrimination expires—rather than acknowledging that it adapts—they also presume that racial discrimination from “long ago” is no longer constitutionally relevant. In this regard, they miss how present-day racial disparities were operationalized and embedded in our social landscapes by past discrimination.

#### *B. A Practical Account of Adaptive Discrimination*

Here is a quick test. What do the following have in common: a racial zoning law struck down by the Supreme Court in 1917, the 1972 demolition of the Pruitt-Igoe housing projects in St. Louis, and the 2014 shooting death of an unarmed black teenager by a white police officer, mentioned in the opening paragraphs of this Article? The answer is that together they illustrate adaptive discrimination as it stretches through time to regenerate racial inequality. This Section illustrates how systems that were designed to evade and subvert antidiscrimination law created the supervening conditions for the fatal encounter between the teenager and the Ferguson police officer. Because we tend to perceive racial discrimination in subject-driven frames, these examples help us understand racial discrimination as a subordinating system that adapts as new legal regimes take effect. It also allows us to appreciate the connection between and among

different forms of discrimination and how they persist from the past to the present.<sup>170</sup>

We can start this narrative in 1917. In an earlier period, St. Louis, like so many places around the country,<sup>171</sup> had racial zoning ordinances that prohibited blacks from moving into predominantly white areas.<sup>172</sup> However, in 1917, the Supreme Court declared these policies unconstitutional in *Buchanan v. Warley*.<sup>173</sup> Undeterred by the Court's ruling, St. Louis concocted another approach.<sup>174</sup> It removed overt references to race in its zoning laws and adopted rules that designated single-family residential housing for the virtually all-white areas of the city, while prohibiting other uses that blacks (who were disproportionately poor) could afford.<sup>175</sup> Deed restrictions on private property that barred blacks from moving in<sup>176</sup> helped to effectuate the scheme.<sup>177</sup> Thus, under the guise of municipal laws that were ostensibly race-neutral, city officials—in concert with private parties—created and perpetuated racial segregation that would not readily be detected by law.<sup>178</sup>

Having purposefully created white neighborhoods, city planners then manipulated zoning rules to ensure that the least desirable uses of land, such as “taverns, liquor stores, nightclubs, and houses of prostitution”<sup>179</sup> would be located next to, or in, black

170. Many of my examples are rooted in a black-white paradigm. By using these examples, I do not intend to exclude other people of color from my analysis. Rather, I use this paradigm only to illustrate the core, historical functionality of racial discrimination.

171. See ROTHSTEIN, *supra* note 6, at 7; REYNOLDS FARLEY, SHELDON DANZIGER & HARRY J. HOLZER, DETROIT DIVIDED 145–48 (2000).

172. *Id.* at 7.

173. 245 U.S. 60, 82 (1917) (striking down a racial zoning ordinance on due process grounds).

174. See ROTHSTEIN, *supra* note 6, at 7.

175. *Id.*

176. *Id.* at 14 (describing public entanglement in racially restrictive covenants).

177. *Id.* at 7, 12–15. The first such restrictive covenant was recorded in St. Louis in 1910. *Id.* at 13. These restrictive covenants operated with legal sanction until *Shelley v. Kraemer* declared them constitutionally unenforceable in 1948. 334 U.S. 1, 22–23 (1948). However, the use of such covenants persisted in many jurisdictions for decades. See JACKSON, *supra* note 126, at 201–15.

178. ROTHSTEIN, *supra* note 6, at 7 (“[St. Louis] developed these new rules with racial purposes unhidden, although race was not written into the text of the zoning rules themselves.”).

179. *Id.* at 9; see also FARLEY ET AL., *supra* note 171, at 146; BERYL SATTER, FAMILY PROPERTIES: RACE, REAL ESTATE, AND THE EXPLOITATION OF BLACK AMERICA 6 (2010) (attributing the decline of “many black urban neighborhoods” to exploitative real estate practices that preyed on “hard-pressed but hard-working and ambitious African Americans”).

neighborhoods.<sup>180</sup> Because of these practices, many homes owned or rented by blacks were ineligible for federally backed mortgages, many of which included underwriting policies that prohibited federal guarantees for properties located next to “inharmonious uses.”<sup>181</sup>

While undermining middle-class investment in black neighborhoods, federal policy also concentrated racialized poverty in central cities. This effort began in St. Louis through the intentional destruction of racially integrated communities.<sup>182</sup> In the early 1950s, the city began to build the Pruitt-Igoe towers, high-rise projects designated to house poor blacks.<sup>183</sup> A decade later, Pruitt-Igoe “became a national symbol of dysfunctional public housing.”<sup>184</sup> The terrible social conditions, combined with the city’s neglect of the housing project’s physical plant, made tenant life “untenable.”<sup>185</sup> The conditions became so bad that beginning in 1972, the federal government “evicted all residents and dynamited the 33 towers.”<sup>186</sup>

As government policies pushed poor blacks into the central city, the Federal Housing Administration opened homeownership opportunities exclusively for whites in the suburbs.<sup>187</sup> Federal investment in white communities in turn spurred significant private investment.<sup>188</sup> These racialized patterns of public and private disinvestment deepened the racial divide across the St. Louis metropolitan area,<sup>189</sup> with the city’s north side becoming identifiably black, and the south side identifiably white.<sup>190</sup> The economic impact

180. See ROTHSTEIN, *supra* note 6, at 7–9.

181. *Id.* at 15 (“Beginning in 1934, and continuing thereafter, [Federal Housing Administration] underwriting manuals stated that ‘protection against some adverse influences is obtained by the proper zoning and deed restrictions that prevail in the neighborhood’ and elaborated that ‘the more important among the adverse influential factors are the ingress of undesirable racial or nationality groups.’”). Real estate owners took advantage of the high demand for black housing and limited supply to warehouse blacks in “racial ghettos,” where they were forced to pay exorbitant sums for dilapidated units. FARLEY ET AL., *supra* note 171, at 146; ALLAN H. SPEAR, *BLACK CHICAGO: THE MAKING OF A NEGRO GHETTO, 1890–1920*, at 91–111 (1967).

182. See ROTHSTEIN, *supra* note 6, at 10–12 (discussing efforts to destroy integrated neighborhoods).

183. *Id.* at 12.

184. *Id.*

185. *Id.*

186. *Id.*

187. See JACKSON, *supra* note 126, at 203–15; ROTHSTEIN, *supra* note 6, at 12 (describing purposeful segregation in federal public housing policy).

188. See ROTHSTEIN, *supra* note 6, at 14–19.

189. *Id.* at 15.

190. *Id.*

of this racial segregation was striking. The precipitous decline of black neighborhoods was matched only by the upswing in public investment in white neighborhoods.<sup>191</sup> As black income stagnated, white wealth increased dramatically.<sup>192</sup> Employment discrimination by the biggest local employers and by predominantly white unions further exacerbated the vast and growing racial disparities.<sup>193</sup>

Denied the investment and resources that had been extended to white suburbanites, the economic infrastructure of black neighborhoods collapsed.<sup>194</sup> Services “like trash collection, street lighting, and emergency response” were whittled away.<sup>195</sup> In return, St. Louis devised urban renewal programs to eliminate black neighborhoods.<sup>196</sup> The thinly disguised goal, incentivized by federal policy, was to push blacks out of the city.<sup>197</sup> Effectively barred by exclusionary zoning ordinances in suburbs south of the city, by real estate practices that steered blacks away from white neighborhoods, and other forms of public and private discrimination, many blacks resettled in the northern and northwestern suburbs of St. Louis County, where Ferguson is located.<sup>198</sup>

But the move to Ferguson and other northern suburbs only created additional problems for the region’s new black residents. Understanding this point requires some appreciation of the metropolitan region’s highly fragmented jurisdictional system that stretched municipal resources.<sup>199</sup> Originally designed in part to perpetuate racial segregation,<sup>200</sup> the patchwork of separate jurisdictions meant that small towns and cities were forced to

191. See JACKSON, *supra* note 126, at 209–15 (describing federal and private investment in white suburbs and disinvestment in minority neighborhoods).

192. See DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 124–29 (1998).

193. See ROTHSTEIN, *supra* note 6, at 28.

194. See *id.* at 4–5 (suggesting that black neighborhoods were intentionally denied services, such as curbs, that were made available to other parts of the city).

195. *Id.* at 19.

196. *Id.*; see also SHARKEY, *supra* note 153, at 180 (noting the “razing of neighborhoods during urban renewal”).

197. See ROTHSTEIN, *supra* note 6, at 14–19 (discussing federal programs designed to push blacks out of the city).

198. *Id.* at 18–19.

199. See Peter Coy, *The County Map that Explains Ferguson’s Tragic Discord*, BLOOMBERG (Aug. 15, 2014), <http://www.bloomberg.com/bw/articles/2014-08-15/how-st-dot-louis-countys-map-explains-fergusons-racial-discord> [<http://perma.cc/7R4W-A5JD>].

200. *Id.* (“Dating as far back as the 19th century, communities set themselves up as municipalities to capture control of tax revenue from local businesses, to avoid paying taxes to support poorer neighbors, or to exclude blacks.”).

compete for a limited pool of tax revenue, leaving fewer fiscal resources for services that were already reduced as a result of the relatively small tax base.<sup>201</sup>

The influx of blacks spurred white flight<sup>202</sup> from Ferguson and other northern suburbs.<sup>203</sup> However, rapid racial turnover in the population, combined with voting schemes designed to dilute minority voting strength, extended Ferguson's white power structure and its dominance over the majority-black population.<sup>204</sup> To address persistently low sources of municipal revenue, white officials directed law enforcement to ticket and fine residents in black neighborhoods for minor municipal offenses.<sup>205</sup> Blacks who could not pay were jailed at disproportionately high rates and charged compounded interest, leading to even higher fines over time.<sup>206</sup> Law enforcement's predatory behavior toward black residents sowed deep community distrust and resentment of the local police.<sup>207</sup>

This is the point where the story of the officer's fatal shooting of a black teenager on the Ferguson streets typically begins. But as we can see, this conventional account skips over nearly one-hundred years of racial history.<sup>208</sup> And it pointedly leaves out historical context—such as the early racial zoning law and the concentration of racialized poverty in St. Louis that led to the notorious Pruitt-Igoe towers and, eventually, to efforts by St. Louis officials to expel blacks from the city. These historical moments allow us to unpack the racialized dynamics and tension that unfolded in Ferguson after the teenager's death and to identify the discriminatory behavior and

201. *Id.*

202. *Id.*

203. See ROTHSTEIN, *supra* note 6, at 31 (“African Americans who were displaced then relocated to the few other places available, converting towns like Ferguson into new segregated enclaves.”); see also *id.* at 23; Hannah-Jones, *supra* note 9.

204. See Smith, *supra* note 9.

205. See DOJ REPORT, *supra* note 5, at 4–5; Radley Balko, *How Municipalities in St. Louis County, Mo., Profit from Poverty*, WASH. POST (Sept. 3, 2014), <https://www.washingtonpost.com/news/the-watch/wp/2014/09/03/how-st-louis-county-missouri-profits-from-poverty/> [https://perma.cc/UZJ7-2F5C] (describing municipal fines for having “uncut grass or unkempt property[.]” “wearing saggy pants[.]” or “not subscribing to the town’s only approved garbage collection service”).

206. See DOJ REPORT, *supra* note 5, at 54–56 (describing the system of unduly harsh penalties and steep interest payments in the Ferguson police system).

207. See ROTHSTEIN, *supra* note 6, at 31.

208. This account also notably fails to mention the infamous St. Louis case of *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), which declared that blacks had no rights that the “white man was bound to respect.” *Id.* at 407.

attitudes that have been transmitted by public and private actors through time.

This sprawling, unwieldy narrative—of different kinds of public and private discrimination across multiple geographies through the generations—offers a different, diagnostic approach to understanding the fatal encounter between the black teenager and white officer. It enables us to understand the complex forces that set the stage for this tragic moment and to be alert to the presence of adaptive techniques in other areas. The youth's death triggered our search for deeper explanations about the multidimensional reasons for our racial inequality. However, we could use the same diagnostic approach to explain similar racial disparities throughout the country.

In sum, we can seek to understand race the way we seek to understand human disease. Just as a doctor takes a person's family history to determine the origins of a serious illness, we also need to look back in time to figure out how we arrived at this place of deep racial dysfunction and tragedy. Understanding this history helps us to understand the present. I return to these points in Part III, where I explore what the law might do to address adaptive discrimination and to help shine a light on our hidden racialized systems.

## II. HOW CONSTITUTIONAL LAW FACILITATES ADAPTIVE DISCRIMINATION

In her path-breaking book, *The New Jim Crow*, Michelle Alexander tells the story of Jarvis Cotton, an African-American parolee unable to vote due to the felon disenfranchisement law in his state:

Jarvis Cotton cannot vote . . . . Cotton's great-great-grandfather could not vote as a slave. His great-grandfather was beaten to death by the Ku Klux Klan for attempting to vote . . . . His father was barred from voting by poll taxes and literacy tests. Today, Jarvis Cotton cannot vote because he, like many Black men in the United States, has been labeled a felon and is currently on parole.<sup>209</sup>

This short narrative illustrates each of the components of adaptive discrimination outlined in the previous Part's sections. It involves discrimination in voting and law enforcement, insofar as blacks comprise a disproportionate number of those imprisoned and, thus, a

209. ALEXANDER, *supra* note 13, at 1.

disproportionate number of those affected by felon disfranchisement.<sup>210</sup> It also shows the dynamism of racial discrimination through the multiple iterations of race-explicit and formally race-neutral voting schemes that have denied black voting rights since slavery, resulting in racial subordination across the generations.

Finally, Alexander's example illustrates the regenerative aspects of discrimination: the inability to vote diminishes the political leverage of minority populations to change racially discriminatory government policies.<sup>211</sup> Segregated schools and housing, the predatory behaviors of law enforcement commanded to contain blacks in their isolated spaces, and the host of social ills that flowed across generations from these tragic systems (from his grandfather, to his father, to Cotton himself) are all the products of adaptive discrimination's invisible operation. Discrimination in these contexts generates other pernicious consequences downstream, as blacks are shut out of centers of social and economic opportunity in ways that disempower whole communities and neighborhoods. Once its full dimensions are unpacked, Cotton's story demonstrates why we can never hope to arrest more than a tiny amount of racial inequality through constitutional law in its current form, which focuses primarily on intent.

Conventional legal and social theories of racial discrimination reject the premise of adaptive discrimination that past discrimination is connected to present systemic racial disadvantage.<sup>212</sup> This Part focuses on the deficiencies in constitutional doctrine, but similar

210. See, e.g., *Hunter v. Underwood*, 471 U.S. 222, 232 (1985).

211. For example, a recent U.S. Department of Justice report indicated that the City of Ferguson, Missouri aggressively tickets African Americans and uses the resulting revenue from fines to fund the city's municipal budget. See DOJ REPORT, *supra* note 5, at 4–5. Because Missouri law limits the ability of persons convicted of a felony to vote, see *Howard v. United States*, No. 4:06CV563 CDP, 2009 WL 1211164, at \*7 (E.D. Mo. May 1, 2009) (describing a Missouri law that restores voting rights to former felons only after they have completed incarceration and supervision), Jarvious Cotton could not vote to change this policy if he lived in Ferguson. See Marie Ceselski, *Voter Registration for Felons and 18 Year Olds*, GREAT ST. OF ST. LOUIS (Jan. 3, 2015), <http://thegreatstateofstlouis.wordpress.com/category/voter-registration/> [https://perma.cc/BM6X-5NCL] (indicating that felons may not vote until they have completed their “sentence, probation, or parole”). An estimated “18,000 ex-offenders” live in the St. Louis area. See Steve Giegerich, *New Hiring Guidelines Help Ex-offenders Gain Foothold in Job Market*, ST. LOUIS POST-DISPATCH (Apr. 29, 2012), [http://www.stltoday.com/business/local/new-hiring-guidelines-help-ex-offenders-gain-foothold-in-job/article\\_706f0388-9094-11e1-bbf9-0019bb30f31a.html](http://www.stltoday.com/business/local/new-hiring-guidelines-help-ex-offenders-gain-foothold-in-job/article_706f0388-9094-11e1-bbf9-0019bb30f31a.html) [https://perma.cc/VM76-VMXZ].

212. See Freeman, *supra* note 88, at 1056 (defining “causation principle”).



deficiencies exist in the siloed organization of civil rights claims, with separate statutes for voting,<sup>213</sup> housing,<sup>214</sup> employment,<sup>215</sup> public accommodations,<sup>216</sup> and criminal justice,<sup>217</sup> among others.<sup>218</sup> This fragmentation in antidiscrimination law obscures the interaction and cross-fertilization of racial discrimination across different social, organizational, and institutional contexts.<sup>219</sup> Constitutional doctrine suffers from similar limitations. We are not encouraged to see the ways in which Jarvis Cotton's voting problems relate to the mass incarceration of people of color. Nor do we even think about the ways in which the shooting of the teenager in Ferguson relates to housing segregation or to transportation policies in the wider St. Louis area.<sup>220</sup> By cabining discrimination, we overlook the dynamic relationships and connections between and among its different forms. We miss the full dimensions of racial subordination and the broader picture of racial discrimination as a whole, living, evolving organism.

Section II.A discusses the linear aspects of equal protection doctrine. Section II.B describes early cases that acknowledged adaptive forms of discrimination. Section II.C explores how constitutional law has short-circuited judicial and legislative remedies for discrimination by tying time to determinations about racial motive. I then apply these insights to the *Civil Rights Cases*, school desegregation, and the Court's more recent decision in *Shelby County v. Holder*, which struck down a seminal provision of the Voting Rights Act.

213. See Voting Rights Act of 1965, 42 U.S.C. § 1971 (2012).

214. See Fair Housing Act of 1968, 42 U.S.C. § 3601 (2012) (declaring the provision of fair housing to be among the public policy goals of the United States).

215. See Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e (2012).

216. See *id.* § 2000a.

217. See, e.g., 18 U.S.C. § 241 (2012) (prohibiting a conspiracy to deprive any person of federal constitutional rights); § 242 (making it a federal crime to willfully deprive someone of his civil rights under federal constitutional or statutory law).

218. See, e.g., 42 U.S.C. § 2000d (prohibiting intentional discrimination by entities that receive government funding); § 1981 (barring discrimination in contracts). Although there are some similarities between constitutional law and statutory civil rights laws, they also diverge in important ways. See Rich, *supra* note 14, at 238 (discussing the “divergence and convergence” of constitutional doctrine and statutory law). Constitutional litigation that cuts across subject areas has more promise, but it has been rebuffed in the federal courts. See, e.g., *Missouri v. Jenkins*, 515 U.S. 70, 101 (1995).

219. Cf., e.g., Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1281–82 (2011) (discussing the Supreme Court's differential, context-dependent application of equal protection principles).

220. But see ROTHSTEIN, *supra* note 6, at 4–7, 15–16 (discussing how successive public policies segregated Ferguson and created a racially divisive atmosphere).

A. *The Linearity of Equal Protection*

## 1. Neutralizing Racial Intent

Equal protection assumes that racial discrimination is linear, involving the denial of a particular benefit or the placement of a particular burden on an identifiable person or group of persons because of their race. This transactional narrative is discrete and time-centered; its harms are presumably confined only to the litigants themselves. Within this paradigm, the role of constitutional law is simply to neutralize intentionally discriminatory conduct.<sup>221</sup> Cases like *Washington v. Davis*<sup>222</sup>—which held that disproportionate, adverse racial effects alone are not cognizable under equal protection<sup>223</sup>—along with *Personnel Administrator v. Feeney*<sup>224</sup> and *McCleskey v. Kemp*<sup>225</sup>—which heightened the standard for showing discriminatory intent—created this framework.<sup>226</sup>

Legal scholars have long critiqued the intent paradigm as too narrow and formalistic.<sup>227</sup> Alan Freeman argued decades ago that equal protection ratifies systemic racial discrimination by ignoring the conditions that perpetuate vast racial disadvantage.<sup>228</sup> To sustain a claim, plaintiffs must begin by identifying the bad actor responsible for harmful outcomes that are traceable to specific prior discrimination.<sup>229</sup> Furthermore, actionable discrimination must

221. Freeman, *supra* note 88, at 1053. An abundance of legal scholarship has explored the counter-majoritarian and institutional competence concerns that underlie the intent doctrine. *See, e.g.*, ELY, *supra* note 42, at 1; Brest, *Legislative Motive*, *supra* note 42, at 95; Foster, *supra* note 30, at 1121–22 (discussing various theories of the intent doctrine and offering a more nuanced account); Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1134–42 (1989).

222. 426 U.S. 229 (1976).

223. *Id.* at 258.

224. 442 U.S. 256 (1979).

225. 481 U.S. 279 (1987).

226. *Feeney*, 442 U.S. at 298 (defining “intent” as referring to conduct taken “because of” and not merely “in spite of” a protected characteristic). *See generally* *McCleskey*, 481 U.S. 279 (requiring specific intent).

227. *See, e.g.*, Ian F. Haney-López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1825–26 (2000) (noting significant examples of institutional racism in grand jury proceedings and jury selection and proposing an institutional approach to the study of race); John A. Powell, *Structural Racism: Building upon the Insights of John Calmore*, 86 N.C. L. REV. 791, 795–97 (2008).

228. *See* Freeman, *supra* note 88, at 1053.

229. *Id.* (discussing the “perpetrator perspective”). Indeed, a plaintiff likely would not be able to satisfy standing prerequisites if she alleged systemic causes for a racially disparate outcome. *See generally* Boddie, *supra* note 88 (discussing problems associated with systemic theories in standing doctrine).

manifest within a geographic<sup>230</sup> and subject matter context deemed “relevant” by the courts.<sup>231</sup>

Discrimination should also be discernible within a prescribed period of time, as the Court has rejected remedies for harms that are “ageless in their reach into the past.”<sup>232</sup> These time-based limitations, which I explore further below, are also a function of linear conceptions of racial discrimination. Although we can link current racial disparities to segregation from decades ago and to slavery over a century earlier,<sup>233</sup> the Court does not recognize these harms as a constitutional justification for judicial remedy or even as the basis for voluntary affirmative action.<sup>234</sup> In each of these respects, the intent doctrine is inconsistent with a multidimensional, systemic way of thinking.<sup>235</sup> Although “the world is dynamic, evolving, and interconnected,” this doctrine principally depends on “mental models that are static, narrow, and reductionist.”<sup>236</sup>

## 2. The Rejection of Systemic Theories

Constitutional doctrine has long been hostile to systemic theories of racial discrimination. Consider *Milliken v. Bradley*,<sup>237</sup> which concerned the constitutionality of a district court order that sought to remedy de jure segregation in Detroit public schools with a metropolitan desegregation plan that included the city’s neighboring white suburbs.<sup>238</sup> The Court held that schools could not be integrated across the city-suburb divide, unless the constitutional violation itself also crossed municipal boundaries.<sup>239</sup> Although proven intentional

230. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 485 (1989) (rejecting evidence of racial disparities in the construction industry generally as being outside the “relevant market[.]” which therefore failed to justify a minority contracting program).

231. See, e.g., *id.* at 505 (rejecting evidence of school segregation to justify racial considerations in minority contracting program).

232. See, e.g., *In re African-Am. Slave Descendants Litig.*, 304 F. Supp. 2d 1027, 1075 (N.D. Ill. 2004) (dismissing a claim for reparations by African-American descendants of slaves on grounds that plaintiffs lacked standing and were time barred and that the claim was a nonjusticiable political question).

233. See generally FEAGIN, *supra* note 1 (discussing how the United States was shaped by extensive slavery and legal segregation).

234. See *infra* Section II.C.

235. As Sheila Foster has argued, however, intent can be demonstrated in multiple ways, and, in some cases, equal protection allows an inference of intent based on a showing of adverse racial impact. See Foster, *supra* note 30, at 1121–40.

236. See Stermán, *System Dynamics Modeling*, *supra* note 10, at 11.

237. 418 U.S. 717 (1974).

238. *Id.* at 717–18.

239. See *id.* at 761–62.

discrimination by the Detroit school board—and a state law that exacerbated racial segregation<sup>240</sup>—helped to instigate white flight,<sup>241</sup> the Court refused to attribute these racial practices to a constitutional wrong.<sup>242</sup> In so doing, the Court insulated a cross-jurisdictional system that effectuated racial segregation. As the theory of adaptive discrimination would predict, the ramifications of the Court's decision reverberate even today in the Detroit area, where wrenching racial inequality has intensified.<sup>243</sup>

Similarly in *Missouri v. Jenkins*,<sup>244</sup> the Court concluded that a federal court order designed to facilitate interdistrict desegregation exceeded the court's remedial authority to remedy an intradistrict violation.<sup>245</sup> The Court's power was limited to “restoring victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.”<sup>246</sup> Reflecting longstanding assumptions that discrimination is transactional and discrete, rather than dynamic and multifaceted, the Court considered it dispositive that the plaintiffs had failed to prove a “causal” relationship between intentional segregation by the Kansas City school district and segregation in the surrounding area.<sup>247</sup> The Court's decision not only stymied metropolitan desegregation efforts in the wake of white flight, but, along with *Milliken*, elevated the jurisdictional boundary as another constitutional barrier to systemic redress.

### 3. The Myth of the “Private” and the “Public” as Distinctive Spheres

As discussed earlier, public and private practices have created and perpetuated racial discrimination across and within multiple spheres. For example, federal, state, and local laws all facilitated and

240. See *id.* at 726–27 (discussing the district court's finding that the state committed constitutional violations by failing to provide students in Detroit the same “full range of state-supported transportation” as was provided to “many neighboring, mostly white [] suburban districts” and by acting to “impede, delay, and minimize racial integration in Detroit schools” (citing *Bradley v. Milliken*, 338 F. Supp. 582, 589 (E.D. Mich. 1971))).

241. See *id.* at 724–26.

242. As Professor David Troutt writes, this decoupling of private and public action was contrary to conventional local thinking about racial segregation across the city-suburb divide. See PRICE OF PARADISE, *supra* note 91, at 109. For some Detroit residents who participated in a focus group, “the relationship between Detroit's tradition of segregated schools and white flight to its suburbs was as close as cause and effect.” *Id.*

243. See *id.* at 110–11.

244. 515 U.S. 70 (1995).

245. *Id.* at 92.

246. *Id.* at 88 (quoting *Milliken v. Bradley*, 418 U.S. 717, 746 (1974)).

247. *Id.* at 95–96.

encouraged white flight from central cities to the suburbs,<sup>248</sup> creating conditions that private landlords in the central cities then exploited in ways that exacerbated housing discrimination.<sup>249</sup> When black students began to enroll in public schools that were formerly segregated by law, many white students fled to private, all-white academies, intensifying the racial isolation of blacks in public education.<sup>250</sup> These public-private connections are also evident in criminal justice, as law enforcement officials have ruthlessly punished perceived infractions of the white social order.<sup>251</sup>

Equal protection doctrine forces lower courts and litigants to ignore this context.<sup>252</sup> I discuss one aspect of this problem below in the area of school desegregation.<sup>253</sup> In these cases, the Court has limited federal judicial authority to remedy persistent segregation based on time-centered presumptions that racial segregation is attributable to private, “natural” preferences,<sup>254</sup> rather than being the consequence

248. See JACKSON, *supra* note 126, at 196–99.

249. See, e.g., SATTER, *supra* note 179, at 40 (exploring the role that the real estate industry played in perpetuating substandard housing for blacks in Chicago and exacerbating housing discrimination).

250. Allen v. Wright, 468 U.S. 737 (1984), *abrogated by* Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377 (2014); see also Boddie, *supra* note 88, at 350.

251. See KENNEDY, *supra* note 74, at 88 (“During the age of segregation, authorities used the criminal law to impose a stigmatizing code of conduct upon Negroes, one that demanded exhibitions of servility and the open disavowal of any desire for equality.”); *id.* at 90 (“During the Jim Crow era, officials also used criminal law to reimpose involuntary servitude upon blacks.”); see also BLACKMON, *supra* note 69, at 7 (describing the economic system of forced labor that resulted in the kidnapping and reenslavement of thousands of blacks for the benefit and profit of national private industry); *id.* (“By 1900, the South’s judicial system had been wholly reconfigured to make one of its primary purposes the coercion of African Americans to comply with the social customs and labor demands of whites.”).

252. We might also treat this as a problem with the state action doctrine, which fails to acknowledge the synergies between private and public discrimination.

253. See *infra* Section II.C.2.a (discussing school desegregation cases); see also Freeman, *supra* note 88, at 1072 (“Racial discrimination is thus wrenched from its social fabric and becomes a mere question of private, individual taste.”). But see City of Richmond v. J.A. Croson Co., 488 U.S. 469, 492 (1989) (plurality opinion) (discussing a theory of how government “passive[ly] participa[tes]” in private discrimination).

254. Some federal courts in an earlier era, however, acknowledged the relationship between private “preferences” and public policies that had actively promoted segregation. For example, one federal district judge attributed the segregative housing choices of vast numbers of white families to the Chicago Housing Authority’s intentionally discriminatory housing practices. *Gautreaux v. Chi. Hous. Auth.*, 296 F. Supp. 907, 915 (N.D. Ill. 1969), *aff’d*, 436 F.2d 306 (7th Cir. 1970). The district court concluded that the decision by “188,000 White families eligible for public housing . . . to forego their opportunity to obtain low cost housing rather than to move into all Negro projects in all Negro neighborhoods” was the “predictable result” of the housing authority’s “segregationist

of past government actions, which have fostered and enabled private discriminatory behavior.<sup>255</sup>

#### 4. Colorblindness and “Societal Discrimination”

Colorblindness principles in equal protection further corrupt our understanding of racial discrimination and blind the courts to its many permutations. For example, in *Regents of the University of California v. Bakke*,<sup>256</sup> the Supreme Court struck down a university’s affirmative action policy that was designed to open opportunities to people of color in higher education as a response to widespread racial disparities and general historical discrimination.<sup>257</sup> For the Court, however, the university’s goal of remedying “societal discrimination” was too “amorphous,” “ageless in its reach into the past,” and unconnected to “specific[,]” identified racial wrongdoing.<sup>258</sup> Only particularized discrimination could justify race-specific affirmative action policies.<sup>259</sup> Moreover, any such use of race triggered the most rigorous judicial review.<sup>260</sup> For some time, this standard nearly always resulted in the invalidation of the challenged policy.<sup>261</sup>

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policy.” *Id.* The court similarly interpreted demographic “trends” that concentrated blacks in the central city and that led to white flight into the surrounding suburbs. *Id.*; see also *Gautreaux v. Chi. Hous. Auth.*, 503 F.2d 930, 937–38 (7th Cir. 1974) (discussing the necessity of a metropolitan-wide remedy involving siting of public housing in the surrounding suburbs), *aff’d sub nom. Hills v. Gautreaux*, 425 U.S. 284 (1976). Rather than explaining these residential patterns as the “natural” by-product of racially neutral preferences, as the Supreme Court would do in its later school desegregation decisions, the district court used them to demonstrate the importance of redoubling remedial efforts. See *Gautreaux*, 296 F. Supp. 2d at 915; *infra* Section II.C.2.a. It warned of a “desperately intensifying division of Whites and Negroes in Chicago” if these “existing patterns of residential separation” were not reversed. *Gautreaux*, 296 F. Supp. 2d at 915.

255. See Ford, *supra* note 19, at 1845 (“[R]acially identified space results from public policy and legal sanctions—in short, from state action—rather than being the unfortunate but irremediable consequence of purely private or individual choices.”); cf. *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 211 (1973) (“Intentional school segregation in the past may have been a factor in creating a natural environment for the growth of further segregation.”).

256. 438 U.S. 265 (1978).

257. *Id.* at 307; see also *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 736, 748 (2007) (plurality opinion) (striking down the voluntary use of a race-based student assignment plan to remedy de facto segregation).

258. *Bakke*, 438 U.S. at 307 (opinion of Powell, J.).

259. *Id.*

260. *Id.* at 291.

261. Indeed, in *Adarand v. Peña*, Justice O’Connor sought to “dispel the notion that strict scrutiny is ‘strict in theory, but fatal in fact.’” 515 U.S. 200, 237 (1995) (plurality opinion).

Similarly, in *City of Richmond v. J.A. Croson Co.*,<sup>262</sup> the Court rejected a minority contracting program on the grounds that its goal of improving opportunities for minorities rested on “generalized” assertions of past discrimination in the construction industry as a whole.<sup>263</sup> The Court concluded that plaintiffs’ failure to define the “precise scope” of their injury doomed the remedy to having “no logical stopping point.”<sup>264</sup> Observing that such an “ill-defined wrong”<sup>265</sup> might be used to “justify race-based decision-making [that was] essentially limitless in scope and duration,” the Court struck down the program.<sup>266</sup> The majority rebuffed arguments, propounded by Justice Marshall in dissent,<sup>267</sup> that city officials sought to redress racial discrimination in enacting the local program.<sup>268</sup> The Court determined that evidence of such racial disparities was immaterial because it was outside the “relevant,” locally defined market.<sup>269</sup>

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262. 488 U.S. 469 (1989) (plurality opinion).

263. *Id.* at 498.

264. *Id.*; see also *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 310–11 (1986) (Marshall, J., dissenting) (expressing concerns about the duration of racial considerations).

265. *J.A. Croson*, 488 U.S. at 498.

266. *Id.*

267. See *id.* at 544 (Marshall, J., dissenting) (observing “that the city’s leadership is deeply familiar with . . . racial discrimination” and “[has] spent long years witnessing multifarious acts of discrimination [in voting, school desegregation, and housing]”). In seeking to justify the city’s affirmative action policy, Justice Marshall also advanced a more sophisticated understanding of the connections between private discrimination and the state:

The majority is wrong to trivialize the continuing impact of government acceptance or use of private institutions or structures once wrought by discrimination. When government channels all its contracting funds to a white-dominated community of established contractors whose racial homogeneity is the product of private discrimination, it does more than place its *imprimatur* on the practices which forged and which continue to define that community. It also provides a measurable boost to those economic entities that have thrived within it, while denying important economic benefits to those entities which, but for prior discrimination, might well be better qualified to receive valuable government contracts.

*Id.* at 538.

268. *Id.* at 505 (majority opinion) (“The ‘evidence’ relied upon by the dissent, the history of school desegregation in Richmond and numerous congressional reports, does little to define the scope of any injury to minority contractors in Richmond or the necessary remedy. The factors relied upon by the dissent could justify a preference of any size or duration.”).

269. *Id.* at 485. In *Adarand v. Peña*, the Court extended the same rigorous standard of judicial review to the use of affirmative action in federal programs, imposing strict scrutiny on race-conscious efforts to increase the ranks of persons of color in the contracting industry. 515 U.S. 200, 222 (1995) (plurality opinion). Not until *Grutter v. Bollinger*, 539

In these cases and others,<sup>270</sup> the Court has dismissed widespread racial disparities as a justification for race-conscious remedies because there is no causal connection to intentional discrimination.<sup>271</sup> This “societal” discrimination is so pervasive that the Court has placed it beyond the reach of constitutional remedy, much like a metastatic cancer that cannot be treated because its origins are either unknown or unknowable. In sum, constitutional law has created a framework that deems affirmative action programs, used to promote racial inclusion, as doctrinally suspect. Yet it gives a free pass to adaptive discrimination that fosters and entrenches racial inequality.

*B. Early Civil Rights Cases that Acknowledged Adaptive Forms of Discrimination*

For a very limited time in the aftermath of *Brown v. Board of Education*, the Supreme Court curbed state and local government efforts to circumvent civil rights mandates. Lower federal courts also vigorously enforced judicial remedies against obvious governmental resistance.<sup>272</sup> As discussed earlier, adaptive strategies used by government officials included the use of alternative discriminatory structures to condition access to education, such as all-white private schools and “freedom of choice” plans that perpetuated segregation by deferring to white preferences for white schools.<sup>273</sup>

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U.S. 306 (2003) (plurality opinion), did the Court uphold a race-conscious admissions policy that was designed to promote the educational benefits of diversity. *Grutter*, 539 U.S. at 343–44. And even then the Court was careful to distinguish this narrow justification from the broader “societal discrimination” rationale that had been rejected in *Bakke*. *See id.* at 323–24.

270. *See, e.g.,* *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 731 (2007) (plurality opinion) (“The sweep of the mandate claimed by the district is contrary to our rulings that remedying past societal discrimination does not justify race-conscious government action.”); *Adarand*, 515 U.S. at 222 (applying strict scrutiny to affirmative action in federal contracting); *J.A. Croson*, 488 U.S. at 498 (affirmative action in municipal contracting); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 (1986) (arguing that racial classifications must have an exact connection with their justifications).

271. *See, e.g., In re African-Am. Slave Descendants Litig.*, 375 F. Supp. 2d 721, 780–81 (N.D. Ill. 2005) (dismissing reparations claims on multiple grounds, including standing and the political question doctrine), *aff’d in part as modified, rev’d in part*, 471 F.3d 754 (7th Cir. 2006).

272. *See infra* text accompanying notes 353–55.

273. *See supra* Section I.A; *cf. Boddie*, *supra* note 88, at 349–52 (describing unsuccessful efforts to challenge federal tax exemptions to private, discriminatory white schools, which undermined public school desegregation).



The Supreme Court addressed some dimensions of this problem in *Green v. County School Board*.<sup>274</sup> The Court struck down a “freedom of choice” plan adopted by a local school district in rural Virginia that had been segregated by law.<sup>275</sup> The district consisted of just two schools, one that had been assigned to black students; the other that had been designated for white students.<sup>276</sup> When the district was ordered to desegregate, the state of Virginia passed laws that, while omitting any express references to race, were obviously intended to achieve the same segregative result.<sup>277</sup> One state law divested local school boards of the authority to assign children to schools, reserving that power to the state instead.<sup>278</sup> Under the law, students were “automatically reassigned” to the school they had attended during the previous year.<sup>279</sup> New students were assigned a school selected by the state.<sup>280</sup>

Predictably, the previous racial patterns persisted. Over ten years after the Supreme Court’s decision in *Brown*, “not a single white child” had chosen to attend the black school, and eighty-five percent of the black children in the system still attended the all-black school.<sup>281</sup> Against the context of longstanding state-mandated segregation, the Court declared the plan an unconstitutional effort to perpetuate the prior de jure system,<sup>282</sup> despite its formal prohibition against the intentional exclusion of black children.<sup>283</sup> It directed the school district to eliminate the vestiges of the prior state-enforced system “root and branch”<sup>284</sup> and to devise a plan that “promise[d] realistically to work, and promise[d] realistically to work now.”<sup>285</sup>

Although the Court did not use the precise language of adaptive discrimination, it plainly conceptualized the school desegregation problem in those terms. It observed that “time and flexibility” would be required to “dismantl[e]” “well-entrenched dual systems” given

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274. 391 U.S. 430 (1968).

275. *Id.* at 441.

276. *Id.* at 432.

277. *Id.* at 432–33 (referring to statutes “enacted by Virginia in resistance” to *Brown*).

278. *Id.* at 433.

279. *Id.*

280. *Id.*

281. *Id.* at 441.

282. *Id.* at 438 (describing the “freedom of choice” plan as a “deliberate perpetuation of the unconstitutional dual system”).

283. *Id.* at 441.

284. *Id.* at 438.

285. *Id.* at 439.

the “complex and multifaceted problems [that] would arise.”<sup>286</sup> Accordingly, it placed the burden on the school district to establish that its proposed plan would provide “meaningful and immediate progress toward disestablishing state-imposed segregation.”<sup>287</sup> It further determined that the district court “should retain jurisdiction until it is clear that state-imposed segregation has been completely removed.”<sup>288</sup>

*South Carolina v. Katzenbach*<sup>289</sup> provides another useful example of the Court’s prior willingness to check adaptive techniques, specifically in the context of minority voting.<sup>290</sup> For one-hundred years after the Fifteenth Amendment was ratified, racial discrimination in voting remained deeply entrenched in the South.<sup>291</sup> Government officials routinely developed new strategies for circumventing federal court orders and legislative mandates that barred discrimination.<sup>292</sup> All-white primaries excluded blacks and Latinos from electoral participation, as did poll taxes and literacy tests.<sup>293</sup> When these were outlawed or struck down, public officials devised other discriminatory methods to replace them.<sup>294</sup> These innovations did not deny access to the ballot outright, but they had the comparable effect of weakening minority voting power.<sup>295</sup> At-large voting schemes and the annexation of predominantly white areas to majority-black ones were commonly used to dilute the

286. *See id.* at 437.

287. *Id.* at 439.

288. *Id.*

289. 383 U.S. 301 (1966), *abrogated by* *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2631 (2013) (holding the coverage formula in Section 4(b) of the Voting Rights Act to be unconstitutionally outdated).

290. *See id.* at 308.

291. *See* *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2619–20 (2013); KEYSSAR, *supra* note 103, at 216. These problems are in other parts of the country as well. *See* *Shelby Cty.*, 133 S. Ct. at 2620.

292. *See* MINORITY VOTE DILUTION, *supra* note 103, at 2.

293. *Id.* at 3.

294. *See* Pamela S. Karlan, *John Hart Ely and the Problem of Gerrymandering: The Lion in Winter*, 114 YALE L.J. 1329, 1330–31 (2005) (discussing minority vote dilution); Nina Perales, Luis Figueroa & Criselda G. Rivas, *Voting Rights in Texas: 1982–2006*, 17 S. CAL. REV. L. & SOC. JUST. 713, 713–14 (2008) (discussing strategies used to suppress the minority vote in Texas); *see also* MINORITY VOTE DILUTION, *supra* note 103, at 12 (noting that some discriminatory responses to increased minority voting succeeded despite the Voting Rights Act); Freeman, *supra* note 88, at 1082 (citing U.S. COMM’N ON CIVIL RIGHTS, VOTING IN MISSISSIPPI 10 (1965) (noting that many efforts to increase black voter participation in the the 1960s South were ultimately unsuccessful)).

295. *See* Nina Perales, *Reflections on the Fiftieth Anniversary of the Civil Rights Act of 1964*, 2014 U. CHI. LEGAL F. 1, 10 (2014).

minority vote.<sup>296</sup> By adapting their techniques, these jurisdictions successfully evaded enforcement.

Plaintiffs could always challenge these tactics in court, of course, but litigation was a slow, expensive, and often ineffective remedy, as the resulting discrimination irreparably skewed election outcomes.<sup>297</sup> As soon as federal courts barred one form of voting discrimination, another form of discrimination surfaced in its place. Plaintiffs could not sue—and the courts could not move—fast enough to keep up with the problem.

Congress passed the 1965 Voting Rights Act in response. The Act contained mechanisms that targeted recidivist jurisdictions with records of repeated voting discrimination and required them to secure federal approval before they could adopt new voting requirements.<sup>298</sup> In *Katzenbach*, the Supreme Court squarely rejected a constitutional challenge to these provisions, taking explicit account of the adaptive aspects of voting discrimination that had precipitated the Act.<sup>299</sup> In upholding these provisions under Congress's constitutional authority to enforce the Fifteenth Amendment, the Court noted the “unremitting and ingenious defiance” of the covered jurisdictions, which stubbornly sought to defy constitutional and statutory bans on intentional racial discrimination.<sup>300</sup> It concluded that such provisions were critical for curbing discrimination before it could mutate and take root in a different form.

### C. *The Hidden Role of Time*

The previous Section explored decisions handed down by the Supreme Court at the height of its commitment to civil rights, when it was prepared to support a more robust role for the federal courts and Congress in policing adaptive forms of discrimination. In these early

296. See, e.g., MINORITY VOTE DILUTION, *supra* note 103, at 2. Other techniques that appeared race-neutral were in fact designed to frustrate minority voters. When the Supreme Court struck down the poll tax in 1966, Texas immediately legislated an annual voter registration requirement that made it harder to vote. See Robert W. Doty, *The Texas Voter Registration Law and the Due Process Clause*, 7 HOUS. L. REV. 163, 163 (1969).

297. See sources cited *supra* note 294.

298. *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2635 (2013) (Ginsburg, J., dissenting) (observing that the Voting Rights Act sought to redress “second-generation barriers” to voting, such as racial gerrymandering, the discriminatory use of at-large voting, and the annexation of majority-white areas that were designed to dilute minority voting strength).

299. *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966), *abrogated by* *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2631 (2013).

300. *Id.* at 309.

cases the Court was far more willing than in later cases to infer a racially discriminatory motive.<sup>301</sup> As discussed below, that readiness to attribute racially disparate outcomes to discriminatory intent later faded. What accounts for this shift?

This Section attributes the Court's recent decisions to an assumption that discrimination ceases to be constitutionally cognizable after a certain period of time—in other words, that it expires (rather than adapts), at which point it is beyond constitutional remedy. Here I explore the role that time plays in constitutional determinations about the legitimacy of legislative and judicial remedies. I contend that the Court's misplaced focus on time has led it to disregard discrimination's adaptive qualities.

We can understand the origins of the problem by returning to the precepts of adaptive discrimination. Given basic human tendencies, judges interpret constitutional law using shortcuts to make sense of the complex systems and operations that create racial discrimination. These temporal constructs, however, limit their understanding. As a result, they are more likely to presume that time severs the “causal” relationship between prior intentional discrimination and current racial disparities. As a result, litigation outcomes in discrimination cases often depend on a hidden contest over the significance of time.

This happens in two ways. First, litigants debate the relationship of past racial discrimination to current racial disparities.<sup>302</sup> Second, in addition to the historical record, existing doctrine implicitly demands a focus on how much time has passed *since* the initial constitutional violation. The length of elapsed time is used to assess the decisionmaker's underlying racial motivation and, therefore, the constitutional necessity of ongoing race-based remedies. This last use of time is particularly problematic. As a heuristic, it masks and confuses the way that racial discrimination operates.

301. See Brest, *Legislative Motive*, *supra* note 42, at 99–100 (discussing the apparent racial motivation in *Griffin v. County School Board*, 377 U.S. 218 (1964), and *Gomillion v. Lightfoot*, 364 U.S. 339 (1960)).

302. See, e.g., Richard L. Hasen, *Shelby County and the Illusion of Minimalism*, 22 WM. & MARY BILL RTS. J. 713, 731 (2014) (noting the *Shelby County* majority's “ahistoricism”); Joel Heller, *Shelby County and the End of History*, 44 U. MEM. L. REV. 357, 362 (2013) (discussing “the importance of looking to past conditions to evaluate present circumstances”).

1. The *Civil Rights Cases*

Decided in 1883, the *Civil Rights Cases* offer one early example of the time problem in constitutional doctrine. The Court's decision struck down congressional legislation passed in 1875 that prohibited private racial discrimination in public accommodations.<sup>303</sup> The Court's conclusion that Congress had exceeded its enforcement powers under the Thirteenth Amendment in passing the public accommodations law is most interesting for present purposes. The Thirteenth Amendment, which abolished slavery,<sup>304</sup> unquestionably reaches private conduct.<sup>305</sup> The Court concluded that Congress's powers extended beyond state laws "establishing or upholding slavery"<sup>306</sup> and embraced an affirmative mandate to "establish[] and decree[] universal civil and political freedom throughout the United States."<sup>307</sup> It further determined that Congress's authority to enforce these freedoms included the "right to enact all necessary and proper laws for the obliteration and prevention of slavery, with all its badges and incidents."<sup>308</sup>

This expansive reading of the Thirteenth Amendment would seem to suggest that congressional power reached private discrimination at least in places of public accommodation. But here the Court pivoted to a more formalistic understanding: the "incidents" of slavery had nothing to do with the denial of public accommodation on the basis of race.<sup>309</sup> Access to privately owned places of public accommodation was not a "fundamental right" of

303. The Court concluded that the law exceeded Congress's enforcement powers under the Thirteenth and Fourteenth Amendments. *See id.* at 27–28 (1883). Moreover, the Court determined that private discrimination was not "state" action and, therefore, lay beyond Congress's powers to enforce laws against discrimination by governmental actors. *Id.* at 21–23.

304. U.S. CONST. amend. XIII; *see also Civil Rights Cases*, 109 U.S. at 27–28 ("[T]he Thirteenth Amendment, which abolishes slavery... declares 'that neither slavery, nor involuntary servitude, except as punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction;' and it gives Congress power to enforce the amendment by appropriate legislation.").

305. *Civil Rights Cases*, 109 U.S. at 30 ("Under the Thirteenth Amendment the legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not.").

306. *Id.* at 28.

307. *Id.*

308. *Id.*

309. *See id.* at 31.

citizenship, but a “social right”<sup>310</sup> that lay beyond Congress’s enforcement jurisdiction.<sup>311</sup>

Most importantly for our purposes, the Court’s conclusion betrayed its impatience with the asserted connection between the denial of public accommodation and slavery:

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men’s rights are protected.<sup>312</sup>

It is worth pausing here to observe the boldness of the Court’s assertion, not even two decades after the formal end<sup>313</sup> of the Civil War and the passage of the Thirteenth Amendment, that “at some stage” blacks would have to cease being the “special favorite of the law.” The notion that blacks somehow enjoyed favored status—and that such status, having been conferred, had already run out—is astonishing in its own right. But the Court’s flat, one-dimensional characterization of slavery and its “inseparable concomitants” is also fully consistent with what we know about constitutional law over a century later: it propounds the view that the effects of discrimination necessarily diminish as time wears on. Because discrimination recedes, so too should any remedies designed to redress it. Only such a notion could explain the Court’s blindness to the intergenerational damage that slavery had wrought and its highly strained interpretation of the Thirteenth Amendment guarantee.

## 2. How Time Influences Determinations of Racial Motive

The next two Sections turn to school desegregation cases and to *Shelby County*. Many scholars have attributed the outcomes in the school cases to concerns about the institutional competence of the federal judiciary to manage longstanding desegregation efforts and to

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310. *Id.* at 30.

311. *Id.*

312. *Id.* at 31.

313. See Gregory P. Downs, Opinion, *The Dangerous Myth of Appomattox*, N.Y. TIMES (Apr. 11, 2015), <http://www.nytimes.com/2015/04/12/opinion/sunday/the-dangerous-myth-of-appomattox.html> [<https://perma.cc/M98Z-8V4W>] (explaining that the Civil War continued beyond the formal ceasefire).

the virtues of local control.<sup>314</sup> Similarly, *Shelby County* can be framed as a decision about federalism and the Court's conservative commitment to protecting state sovereignty.<sup>315</sup> These Sections do not discount any of these explanations. Rather, they offer another framework for understanding these cases and expose the assumptions about time that linger beneath their surface. Understanding the hidden role of time can also explain how measures that were designed to unwind generations of discrimination become constitutionally suspect.<sup>316</sup> My point is that the legitimacy of such measures is highly sensitive to the passage of time: the more time that has passed, the less justifiable they are in the eyes of the Court.

Here we can connect time to another problem that occupies constitutional law: assessing the role that racial motive plays in government action.<sup>317</sup> In an early article, Paul Brest explained how the passage of time bears on judicial determinations of illicit motive.<sup>318</sup> As Brest conceived the problem, the chronology and sequence of underlying events are important factors.<sup>319</sup> This is because intentional discrimination follows a conventional path: "the decisionmaker enforces a discriminatory operative rule; a court enjoins this practice; the decisionmaker then adopts a constitutionally

314. See Wendy Parker, *The Supreme Court and Public Law Remedies: A Tale of Two Kansas Cities*, 50 HASTINGS L.J. 475, 480 (1999) (describing the "increased importance in returning school districts to 'local control' " in school desegregation cases).

315. Cf. James Blacksher & Lani Guinier, *Free at Last: Rejecting Equal Sovereignty and Restoring the Constitutional Right to Vote*, *Shelby County v. Holder*, 8 HARV. L. & POL'Y REV. 39, 43 (2014) ("[*Shelby County*] is not based on a violation of any specific provision of the Constitution at all. Instead, the majority holds that Section 4 of the Voting Rights Act is unconstitutional because . . . it violates not a Constitutional imperative but a mere 'tradition': 'our historic tradition that all the States enjoy equal sovereignty.'" (quoting *Shelby Cty. v. Holder*, 133 S. Ct. 2621, 2621 (2013))); Hasen, *supra* note 302, at 744–45 (describing the Court's majority opinion in *Shelby County* as the product of "Chief Justice Roberts's longer-term project to bring constitutional jurisprudence in line with his conservative political vision while seeking to project the aura of modest technocratic justices simply doing their jobs").

316. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 803 (2007) (Breyer, J., dissenting).

317. See Louis S. Raveson, *Unmasking the Motives of Government Decisionmakers: A Subpoena for Your Thoughts?*, 63 N.C. L. REV. 879, 880 (1985) ("[The Court has embraced enthusiastically reviewing the purpose for which an official act was taken as a critical factor in determining the action's constitutionality.]").

318. See Brest, *Legislative Motive*, *supra* note 42, at 122.

319. See *id.* ("The juxtaposition of a decision with some prior event or sequence of events often bears on the inference of illicit motivation."); see also *Vill. of Arlington Heights v. Met. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977) (identifying a circumstantial "sequence of events" factor within the broader inquiry into discriminatory intent).

‘innocent’ rule that effectively maintains the *status quo*.<sup>320</sup> A decisionmaker’s “past behavior[.]” Brest wrote, “usually justifies the court’s strong suspicion of his motives.”<sup>321</sup>

This account captures the dynamics of the cases described above, in which intransigent governmental officials in the aftermath of *Brown* resisted integration mandates under the auspices of formally race-neutral practices.<sup>322</sup> Time is central to the Court’s judgment of racial motivation—it explains why in *Green*<sup>323</sup> and *Katzenbach*<sup>324</sup> the Court was willing to acknowledge and curb adaptive practices, but retreated in subsequent decades.

And yet, the presumption that time inoculates us against racial discrimination is inconsistent with history and experience. The fault rests again with the linear conceptions of racial discrimination that underlie Brest’s model. This model focuses on governmental officials with a record of past discriminatory behavior who then promote race-neutral policies with racially harmful outcomes. Under Brest’s formulation, this official conduct is presumptively suspicious because of the chronology and sequence of their actions.<sup>325</sup> This is a reasonable assumption, but it also implies that racial discrimination subsides as new decisionmakers come on board and the more devout racists leave the scene.<sup>326</sup> In other words, it ignores the lessons of history—that racial discrimination has been “handed down” through

320. Brest, *Legislative Motive*, *supra* note 42, at 122.

321. *Id.* at 127.

322. *Id.* at 123 (“The sequence of events may thus support the inference that the decisionmaker’s objective was to do covertly that which he was forbidden to do overtly.”).

323. The *Green* Court also referenced time in its decision, but placed time on the side of the plaintiffs in its determination that the school board’s “freedom of choice” plan was unconstitutional. *Green v. Cty. Sch. Bd.*, 391 U.S. 430, 438 (1968) (“In determining whether respondent School Board met [the command to disestablish its prior dual system] by adopting its ‘freedom-of-choice’ plan, it is relevant that this first step did not come until some 11 years after *Brown I* was decided and 10 years after *Brown II* directed the making of a ‘prompt and reasonable start.’”).

324. See *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966) (“After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims.”), *abrogated by* *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013).

325. Brest, *Legislative Motive*, *supra* note 42, at 126 (discussing the problem of disguised illicit motivation by a repeat offender).

326. *Cf. id.* (“Sometimes a material change of circumstances, or the passage of time accompanied by a change of community attitudes, will be persuasive of the decisionmaker’s good faith.”).



the generations.<sup>327</sup> If experience is our guide, we have far less of a basis to presume good faith in matters of race.

We can see the influence of Brest's theory in equal protection doctrine. For example, in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*<sup>328</sup> the Court considered whether a village acted unconstitutionally in refusing to rezone a parcel of land to accommodate racially integrated, low-income housing.<sup>329</sup> The Court rejected the equal protection claim, concluding that there was nothing in the "specific sequence of events" that led up to the challenged decision or "departures from the normal procedural sequence" that gave rise to the inference of an improper motive.<sup>330</sup> Nor was there anything suspicious in the "contemporaneous statements by members of the decisionmaking body."<sup>331</sup> Therefore, the Court perceived no need for further constitutional inquiry.

Still, the refusal to rezone bore all the hallmarks of adaptive discrimination. The town's decision bore more heavily on racial minorities.<sup>332</sup> And, perhaps most critically, racial segregation was particularly acute in the village relative to the surrounding area.<sup>333</sup> Of its 64,000 residents, only 27 were black.<sup>334</sup> There was good reason to

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327. See FEAGIN, *supra* note 1, at 36 ("For systemic racism to persist across so many generations, white individuals and small groups have had to participate actively in the ongoing collective and discriminatory reproduction of the family, community, legal, political, economic, educational, and religious institutions that undergird this inequalitarian system.").

328. 429 U.S. 252 (1977).

329. *Id.* at 254–55.

330. *Id.* at 267.

331. *Id.* at 268.

332. *Id.* at 269.

333. As the *Arlington Heights* respondents noted in their brief to the Court:

[T]he massive growth in population in Arlington Heights in the past two decades has, with rare exceptions, been limited to whites. Of Arlington Heights' 1970 population of 64,884, 27, or less than 0.1 percent, were black. Arlington Heights is the most residentially segregated community and has the most racially exclusionary housing stock in the Chicago metropolitan area among the municipalities with more than 50,000 residents.

Brief for the Respondents, *Vill. of Arlington Heights v. Metro. Hous. Corp.*, 429 U.S. 252 (1977) (No. 75-616), 1976 WL 181306, at \*12 (internal citations omitted). The respondents further noted that this pattern contrasted sharply with the racial demographics of the Chicago metropolitan area. See *id.* at \*13 ("The number and percentage of blacks [in the area] rose substantially during the 1960s. While their numbers grew, however, almost all minority persons in the Chicago area were still confined to segregated Chicago neighborhoods in 1970." (internal citations omitted)).

334. *Arlington Heights*, 429 U.S. at 255. Some local constituents appeared to object to the development on racial grounds. *Id.* at 269.

be suspicious that the town's zoning decision itself was racially motivated, but the time data in the Court's estimation did not support the inference.<sup>335</sup>

Thus, in *Arlington Heights*, time implicitly drives the constitutional analysis. The Court more readily detects covert racial motive if it manifests close in time to prior overt discrimination. In the absence of such evidence, however, the Court is more likely to presume good faith, weakening the constitutional basis for legislative and judicial remedies and even for voluntary affirmative action.<sup>336</sup> As a result, adaptive discrimination goes unchecked.

The cases discussed below illustrate different dimensions of the same problem. Because of the passage of time, the Court is unwilling to presume illicit racial motivation. In the school desegregation context, the time problem has led the Court to adopt standards that make it easier to terminate federal jurisdiction over long-running cases. In *Shelby County*, the Court invoked time to invalidate a core provision of the Voting Rights Act that curbed adaptive forms of voting discrimination. Once again, the Court relied on linear conceptions of racial discrimination by placing racial intent at the center of the constitutional analysis and then advancing time concerns to avoid finding intent. Both of these constitutional choices obscure the presence of adaptive discrimination.

#### a. *School Desegregation*

A key constitutional question in school desegregation cases has been the scope of a federal district court's equitable authority to retain jurisdiction in cases brought to eliminate the vestiges of state-enforced segregation in public schools.<sup>337</sup> I contend that the standard set by the Court to govern the scope of federal judicial oversight has been influenced by its sense of time. Specifically, it uses time to absolve formerly de jure segregated districts of responsibility for ongoing racial disparities, attributing them to private "preferences,"

335. See *Metro. Dev. Hous. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1294 (7th Cir. 1977) (concluding that the Village's refusal to rezone, assuming a proper showing of discriminatory effect, violated the Fair Housing Act under a disparate impact analysis).

336. See Brest, *Legislative Motive*, *supra* note 42, at 123 ("The strength of the inference will also be affected by the tenacity of the decisionmaker's past commitment to the forbidden rule, the extent to which the innovation marks a departure from traditionally established practices, and the existence of other decisions that seem designed to serve the same illicit objective.").

337. See Parker, *supra* note 314, at 524–28 (discussing the importance of equitable discretion in school desegregation cases).

rather than to the school's prior intentional segregation. The Court achieves this by declaring that the passage of time has severed the causal relationship between past racial intent and current racial inequality.

*Board of Education v. Dowell*<sup>338</sup> illustrates the point. It is worth some effort to unpack the case's chronology to show that, as in the *Civil Rights Cases*, the Court exaggerates time in its rush to terminate judicial supervision. In 1961, black students and their parents sued the Oklahoma City school board to end de jure segregation in the public schools.<sup>339</sup> The district court concluded that the city "had intentionally segregated both schools and housing" and that the board, by design, continued to operate a segregated school system.<sup>340</sup> When the district court ordered the school district to desegregate, the board shifted to a "neighborhood zoning" plan.<sup>341</sup> Because of persistent residential segregation, the plan failed to promote integration.<sup>342</sup> Therefore, the district court in 1972 ordered the school district to adopt more aggressive measures, including busing for both black and white students.<sup>343</sup>

Five years later, in 1977, the school board successfully moved to terminate the case.<sup>344</sup> As the district's racial composition changed due to white flight,<sup>345</sup> the school board returned to its old neighborhood student assignment plan,<sup>346</sup> which further entrenched school segregation.<sup>347</sup> In 1984, plaintiffs moved to reopen litigation.<sup>348</sup> The district court denied plaintiffs' motion and vacated the desegregation decree.<sup>349</sup> Critically for our purposes, the court concluded that

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338. 498 U.S. 237 (1991).

339. *Id.* at 240.

340. *Id.*

341. *Id.*

342. *Id.* ("In 1965, the District Court found that the School Board's attempt to desegregate by using neighborhood zoning failed to remedy past segregation because residential segregation resulted in one-race schools.").

343. *Id.* at 241.

344. *Id.*

345. *Id.* at 242 (noting that young black students were being bused increasingly longer distances due to shifting demographics, meaning that whites were moving to the outer reaches of the city).

346. *Id.*

347. *Id.* ("Under the [neighborhood zoning plan], 11 of 64 elementary schools would be greater than 90% Black, 22 would be greater than 90% White plus other minorities, and 31 would be racially mixed.").

348. *Id.* at 243 (noting that while the district court had "terminated" the case, it had not dissolved the injunctive decree it had entered in 1972).

349. *Id.*

“present residential segregation”—which under the school board’s neighborhood assignment plan ensured a greater percentage of racially segregated schools—was not a product of prior *de jure* segregation.<sup>350</sup> Rather, it was the result of “private decisionmaking and economics” and, therefore, “was too attenuated” to be traceable to the school board’s previous, unconstitutional acts.<sup>351</sup> The lower court further determined that the board’s neighborhood assignment plan had “not been designed with discriminatory intent,” a conclusion that would prove central to the question of whether the district court could continue to exercise its equitable jurisdiction over the case.<sup>352</sup>

The question before the Supreme Court was highly technical, but important. It concerned whether the district court had applied too lenient a standard for dissolving the desegregation decree.<sup>353</sup> On review of the district court’s decision, the court of appeals enunciated a standard that was far more stringent. “[A] desegregation decree remains in effect,” the Tenth Circuit Court of Appeals concluded, “until a school district can show ‘grievous wrong evoked by new and unforeseen conditions,’ ”<sup>354</sup> and “dramatic changes in conditions unforeseen at the time of the decree that . . . impose extreme and unexpectedly oppressive hardships on the obligor.”<sup>355</sup>

The more rigorous standard was central to the disposition of the case. By requiring the district court to continue its supervision of the school district’s desegregation efforts, the higher standard would have meant more integrative measures for Oklahoma City’s public schools. The court of appeals determined that the board’s neighborhood assignment plan would lead to resegregation and that “circumstances in Oklahoma City had not changed enough to justify modification of the decree.”<sup>356</sup>

Although the court of appeals did not use the terminology of adaptive discrimination, its decision to hold the lower court to a more demanding standard acknowledged the problem. By requiring a heightened showing of school board compliance and “dramatic changes in conditions unforeseen at the time of the decree,” the court

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350. *Id.*

351. *Id.*

352. *Id.*

353. *See id.* at 243–44.

354. *Id.* at 244 (quoting *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932)).

355. *Id.* (quoting *Dowell ex rel. Dowell v. Bd. of Educ.*, 890 F.2d 1483, 1490 (10th Cir. 1989)).

356. *Id.*

of appeals acknowledged the systemic, dynamic, and regenerative nature of racial discrimination. In the appellate court's view, a more exacting approach—and one that would undoubtedly lengthen the district court's continued involvement in the case—was necessary for excavating longstanding patterns of racial separation.<sup>357</sup> In other words, segregation required remedial efforts that were worthy of its metastatic qualities.<sup>358</sup>

The Supreme Court reversed, rejecting the more demanding standard. Instead, it concluded that a district court could constitutionally release a local school board from continuing oversight upon a showing that the board “had complied in good faith with the desegregation decree since it was entered, and that the vestiges of past discrimination had been eliminated to the extent practicable.”<sup>359</sup> The Court emphasized that “federal supervision of local school systems was intended as a *temporary* measure to remedy past discrimination.”<sup>360</sup> Once local authorities have complied with a desegregation decree “for a reasonable period of time,” then it is appropriate for the local school board to resume control of its operations.<sup>361</sup> The Court further observed that the “test espoused by the Court of Appeals would condemn a school district, once governed by a board which intentionally discriminated, to judicial tutelage for the indefinite future.”<sup>362</sup>

The *Dowell* formulation made time a key factor for assessing the district court's equitable discretion to modify desegregation decrees.<sup>363</sup> It rested on the assumption that the passage of time cures the constitutional violation and that any remaining segregation must be due to private preferences or to racially “neutral” demographic

357. *Id.*

358. See generally Parker, *supra* note 314, at 479–80 (calling for judges to exercise more robust remedial discretion in school desegregation cases).

359. *Dowell*, 498 U.S. at 249–50. However, the burden is on the school district to make this showing. *Id.*

360. *Id.* at 247 (emphasis added).

361. *Id.* at 248.

362. *Id.* at 249. The Court has cautioned against indiscriminate reliance on history alone as the justification for remedial measures that have “no logical stopping point” in the context of voluntary integration, see *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 760 (2007), and in the context of affirmative action in contracting, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 499 (1989).

363. See *Gautreaux v. Chi. Hous. Auth.*, 981 F. Supp. 1091, 1093–94 (N.D. Ill. 1997) (“[A]s the school desegregation cases instruct us, federal court supervision of local government operations should be a ‘temporary measure to remedy past discrimination’ and is ‘not intended to operate in perpetuity.’” (quoting *Bd. of Educ. v. Dowell*, 498 U.S. 237, 247, 248 (1991))).

changes. With segregation no longer attributable to the perpetrator, it is absolved of any continuing responsibility. As in the *Civil Rights Cases*, the Court overlooked the systemic and dynamic aspects of racial discrimination. Residential segregation had been “set by law for a period in excess of fifty years.”<sup>364</sup> The notion that segregation in Oklahoma City would be fixed in the short five-year period—from the adoption of the 1972 decree, which mandated more aggressive integrative measures, to 1977, when the case was terminated—defies our understanding of how discrimination operates.<sup>365</sup> The very idea reflects an assumption that discrimination ceases once it is declared unconstitutional.

In *Freeman v. Pitts*,<sup>366</sup> another school desegregation case, the Court applied *Dowell*’s weaker standard to hold that a district court could constitutionally release a school district from its supervision in incremental stages, before the district had fully eliminated the vestiges of prior discrimination in all facets of its operations.<sup>367</sup> As in *Dowell*, the Court’s inordinate focus on time clouded its ability to perceive segregation’s adaptive qualities and how easily it could spread across a school system.<sup>368</sup> “As the *de jure* violation becomes more remote in time,” the Court observed, “it becomes less likely that a current racial imbalance in a school district is a vestige of the prior *de jure* system.”<sup>369</sup> Justice Scalia was more pointed in his observations. “At some time,” he noted in his concurring opinion, “we must acknowledge that it has become absurd to assume, without any further proof, that violations of the Constitution dating from the days when Lyndon Johnson was President, or earlier, continue to have an appreciable effect upon current operation of schools.”<sup>370</sup> Once again,

364. Brief for Respondents, *Bd. of Educ. v. Dowell*, 498 U.S. 237 (1991) (No. 89-1080), 1993 WL 340969, at \*6.

365. *Cf. Green v. Cty. Sch. Bd.*, 391 U.S. 430, 437 (1968) (“It is against this background that 13 years after *Brown II* commanded the abolition of dual systems we must measure the effectiveness of respondent School Board’s ‘freedom-of-choice’ plan to achieve that end.”).

366. 503 U.S. 467 (1992).

367. *Id.* at 490–91.

368. For example, by focusing singularly on whether the district had eliminated discrimination in student assignment, it neglected to examine the dynamic interaction between student and faculty assignment. *See, e.g., id.* at 498.

369. *Id.* at 496.

370. *Id.* at 506 (Scalia, J., concurring).

the Court assumed that time naturally purged racially discriminatory attitudes and behavior.<sup>371</sup>

*b. Shelby County v. Holder*

As discussed earlier, the 1965 Voting Rights Act responded to “ingenious and unremitting defiance” of southern states determined to deny voting rights—and thus political power—to African Americans. In enacting this law, Congress looked first to identify those jurisdictions “uniquely characterized by voting discrimination ‘on a pervasive scale’” and then to subject them to more stringent federal remedies.<sup>372</sup> While not all of the areas necessarily used the same suppressive voting techniques, Congress understood the adaptive nature of voting discrimination that operated in the South and other regions. Importantly, Congress determined that jurisdictions with the most persistent records of discrimination tended to share two characteristics: (1) low rates of voter participation and registration and (2) the use of tests or devices that were transparently designed to prevent blacks from voting.<sup>373</sup>

Congress designed the resulting “coverage” provision to disrupt voting discrimination and to curb the use of evasive measures in the jurisdictions that satisfied these criteria. A separate “preclearance” provision required these covered areas to secure federal approval prior to adopting any changes to their voting laws.<sup>374</sup> Thus, Congress “reverse engineered” the coverage provision by adopting a metric that ensured repeat offenders would be subject to federal oversight and supervision.<sup>375</sup> This approach allowed Congress to take direct aim at the ways in which voting policies and practices

371. *Id.* at 491–92 (majority opinion) (“[W]ith the passage of time, the degree to which racial imbalances continue to represent vestiges of a constitutional violation may diminish, and the practicability and efficacy of various remedies can be evaluated with more precision.”).

372. *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2625 (2013).

373. The provision applied if the jurisdiction had used racially discriminatory tests or other “devices” as a voting prerequisite as of November 1, 1964, and if the jurisdiction had low voter registration or turnout in the 1964 presidential election. *Id.* at 2619. These “tests or devices included literacy and knowledge tests, good moral character requirements, the need for vouchers from registered voters and the like.” *Id.* Jurisdictions could “bailout” from coverage upon showing improvement in their voting practices, and a number of jurisdictions did bailout over the years. *Id.* at 2644. The Act was reauthorized in 2006. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act (Voting Rights Act of 2006), Pub. L. No. 109-246, 120 Stat. 577 (codified as amended at 42 U.S.C. §§ 1971, 1973 (2012)).

374. *Shelby Cty.*, 133 S. Ct. at 2619–20.

375. *Id.* at 2628.

mutated to advance racial discrimination.<sup>376</sup> It also usefully allowed Congress to avoid the politically awkward situation of shaming jurisdictions by legislating federal oversight for them by name.<sup>377</sup> In the heated civil rights battles, this political strategy was important.

The *Shelby County* Court rejected Congress's continued reliance on the same coverage formula used to identify discriminatory jurisdictions in 1965.<sup>378</sup> For the majority, several facts meant that the formula was no longer "rational in theory or fact[.]"<sup>379</sup> (1) registration and turnout rates among African-American and white voters, a source of concern at the time of the Act, now "approach parity,"<sup>380</sup> (2) "minority candidates hold office" at levels no one imagined in 1965,<sup>381</sup> and (3) "blatantly discriminatory evasions of federal decrees are rare."<sup>382</sup> The majority concluded that Congress could not upset the delicate balance of power between the federal government and the states with a formula that had not been "updated" with more recent data.<sup>383</sup> Therefore, the Act's "extraordinary"<sup>384</sup> departure from "basic principles"<sup>385</sup> of federalism,<sup>386</sup> which presumed that states would manage their own voting systems without federal interference,<sup>387</sup> was not constitutionally justified.<sup>388</sup>

376. *Id.* at 2625 ("Congress chose to limit its attention to the geographic areas where immediate action seemed necessary." (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966))).

377. *See Shelby Cty. v. Holder*, 679 F.3d 848, 854 (D.C. Cir. 2012) (discussing this political tactic).

378. *Shelby Cty.*, 133 S. Ct. at 2631.

379. *Id.* at 2625.

380. *Id.* (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009)).

381. *Id.*

382. *Id.*

383. *Id.* at 2629.

384. *Id.* at 2628.

385. *Id.* at 2631 (Thomas, J., concurring).

386. *Id.* (observing that if Congress "is to divide the States[,] [it] must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions").

387. *Id.* at 2624 (majority opinion) ("States must beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own . . .").

388. In so holding, the majority contrived a new doctrinal principle—that Congress had infringed the "equal sovereignty" of the states by subjecting some, and not others, to coverage under the Act. *See id.* But this rationale was particularly fraught given the prior settled understanding that Congress acted at the height of its power when it sought to remedy racial discrimination in voting. *See Hasen, supra* note 302, at 733 (noting conservative law professor and former Tenth Circuit Court of Appeals Judge Michael McConnell's observation that the equal sovereignty principle was simply "made up").



Nonetheless, Congress had good reason to believe that the coverage provision still targeted jurisdictions with the most significant discrimination.<sup>389</sup> Although voter registration and participation were no longer the problems they once had been, racial discrimination in the covered areas persisted through adaptive practices that compromised minority voting strength in new ways.<sup>390</sup> The legislative record compiled by Congress in support of the Act's reauthorization in 2006 documented the extent of the problem.<sup>391</sup> Overt discrimination had subsided,<sup>392</sup> but a range of other racially discriminatory practices had surfaced in its place.<sup>393</sup> The Court, however, determined that the record was insufficient.<sup>394</sup> It dismissed evidence of "second-generation barriers" that did not (as in the prior Jim Crow era) block access to the ballot, but rather only diluted "the weight of minority votes."<sup>395</sup> For these Justices, focusing on such measures did not bolster the coverage provision, but "simply highlight[ed] [its] irrationality."<sup>396</sup>

The Court's inordinate focus on what it regarded as the coverage provision's "outdated" features illuminates core flaws in its analysis. The provision's crucial failing was that it relied on voting data from 1964 and "eradicated practices"<sup>397</sup> that had been banned nationwide "for over forty years."<sup>398</sup> "[T]hings have changed dramatically" in the "[n]early 50 years since the [Voting Rights] Act was passed,"<sup>399</sup> the Court observed. Because Congress had not

389. *Id.* at 738–42 ("[U]nder the *Katzenbach* rationality standard, there was ample evidence under which Congress rationally could have concluded that racial discrimination in voting remains a problem in covered jurisdictions . . .").

390. *Shelby Cty.*, 133 S. Ct. at 2635–36 (Ginsburg, J., dissenting) (discussing "second generation barriers" to voting).

391. *Id.* at 2639–44 (discussing evidence of persistent racial discrimination in voting in areas covered by the Act); *see also* Hasen, *supra* note 302, at 738–42. *But* Hasen, *supra* note 302, at 742–43 (discussing political concerns expressed during the Act's 2006 reauthorization about the provision's constitutionality).

392. *But see Shelby Cty.*, 133 S. Ct. at 2640–42 (Ginsburg, J., dissenting) (pointing to examples of intentional discrimination in the covered jurisdictions).

393. *Id.* at 2635–36.

394. *See* Hasen, *supra* note 302, at 714 (noting *Shelby County's* "major doctrinal and jurisprudential change" that "demean[ed] the strength of Congress's power to eradicate racial discrimination in voting").

395. *Shelby Cty.*, 133 S. Ct. at 2629 (criticizing the dissent for "rel[ying] on 'second-generation [voting] barriers,' which are not impediments to the casting of ballots, but rather electoral arrangements that affect the weight of minority votes").

396. *Id.*

397. *Id.* at 2627.

398. *Id.*; *see also id.* at 2625–29 (discussing the "outdated" quality of the formula).

399. *Id.* at 2625.

sufficiently acknowledged that fact when it reauthorized the provision in 2006, the Court concluded that Congress had exceeded its authority.<sup>400</sup> The standard applied in *Shelby County*—that “current burdens” must be justified by “current needs”<sup>401</sup>—makes the point. The metrics for racial discrimination must be grounded in the present; a formula tethered to the past is presumptively irrational.<sup>402</sup>

By training so much of its attention on the passage of time, the Court overlooked the more meaningful question of whether the provision was still performing according to its original purpose, which was to block (reconstituted) voting discrimination in the worst-offending jurisdictions. In 1965, the Act targeted areas with low registration rates and the use of discriminatory tests or devices because at the time they were the most relevant *symptoms* of the more systemic problem. To return to our human disease analogy, the Court’s error was to treat these symptoms as if they were the malady itself—the rash, rather than the underlying metastatic disease. Had the Court understood the constitutional inquiry differently, by concentrating instead on the persistence of adaptive discrimination, it might have realized the reasonableness of Congress’s decision to reauthorize the coverage provision. Instead, the Court’s framing of the constitutional requirement reduced voting discrimination to its constituent parts, rather than conceiving it as a whole system that mutates over time.

The *Shelby County* decision was enormously consequential. By striking down the coverage provision, the Court disabled the only mechanism that had constrained voting discrimination before it could take root. Within hours of the decision, the state of Texas and other formerly covered areas announced their plans to reinstate measures that had been previously blocked.<sup>403</sup> These measures included photo

400. *Id.* at 2631.

401. *Id.* at 2627, 2629.

402. *Id.* at 2629 (“Congress . . . must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions. It cannot rely simply on the past.”).

403. See, e.g., Sahil Kapur, *Texas Advances Voter ID Law After Supreme Court Strikes Down Voting Rights Act*, TALKING POINTS MEMO (June 25, 2013), <http://talkingpointsmemo.com/dc/texas-advances-voter-id-law-after-supreme-court-strikes-down-voting-rights-act> [http://perma.cc/2BKD-25YJ]. See generally NAACP LEGAL DEF. FUND, STATEWIDE AND LOCAL RESPONSES TO THE SUPREME COURT’S VOTING RIGHTS ACT DECISION (2013), [http://www.naacpldf.org/files/case\\_issue/States%20and%20Localities%20Responses%20to%20Shelby%20County%2C%20Alabama%20v.%20Holder%20as%20of%202.18.2015.pdf](http://www.naacpldf.org/files/case_issue/States%20and%20Localities%20Responses%20to%20Shelby%20County%2C%20Alabama%20v.%20Holder%20as%20of%202.18.2015.pdf) [perma.cc/ZB8C-YGB2] (documenting voting discrimination by formerly covered jurisdictions); Gilda R. Daniels, *Unfinished Business: Protecting Voting*

identification laws, some of which apparently were designed to dilute the minority vote.<sup>404</sup> By some accounts, the states' use of these laws skewed the outcome of the 2014 midterm elections.<sup>405</sup>

*Shelby County, Dowell, and Freeman* indicate how time considerations influence race jurisprudence in constitutional doctrine. Time-based justifications for terminating remedial measures are now so deeply engrained in our constitutional jurisprudence that we take them for granted. Indeed, time considerations were present even in *Grutter v. Bollinger*,<sup>406</sup> the Court's only equal protection decision squarely to uphold a race-conscious affirmative action plan.<sup>407</sup> At the

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*Rights in the Twenty-First Century*, 81 GEO. WASH. L. REV. 1928 (2013) (discussing the impact that the loss of Section 4 of the Voting Rights Act has had on voting rights).

404. See Ross, *supra* note 107, at 380 ("Most tellingly, officials who supported voter ID laws or laws restricting early voting as purported anti-fraud measures recently either admitted that these laws in fact served racially discriminatory purposes or were exposed as purposefully callous to the laws' discriminatory effects."). Assertions that photo ID laws are designed to reduce voting fraud appear pretextual, given that in-person fraud is nearly non-existent. On the other hand, voting fraud by absentee ballot is far more common, although state legislators have been reluctant to address it. See, e.g., Sarah Childress, *Why Voter ID Laws Aren't Really About Fraud*, PBS: FRONTLINE (Oct. 20, 2014), <http://www.pbs.org/wgbh/frontline/article/why-voter-id-laws-arent-really-about-fraud/> [<https://perma.cc/9WMH-HVWG>] (observing that "[a]bsentee voters tend to be older and whiter than in-person voters" and describing state legislators' reluctance to address fraud).

405. See BEN JEALOUS & RYAN P. HAYGOOD, THE BATTLE TO PROTECT THE VOTE: VOTER SUPPRESSION EFFORTS IN FIVE STATES AND THEIR EFFECT ON THE 2014 MIDTERM ELECTIONS 1 (2014), <https://cdn.americanprogress.org/wp-content/uploads/2014/12/VoterSuppression-report-Dec2014.pdf> [<https://perma.cc/ZRB7-NBBM>] ("While the precise impact of strict voting laws on the results of the 2014 midterm elections is still unknown, it is clear that the number of people predicted to face increased difficulties in voting during this election either approaches or exceeds the margins of victory for competitive statewide races."). Jealous and Haygood's 2014 report "highlights the decreases in turnout [in the 2014 elections, as compared to] previous midterm elections in the three states—Texas, Alabama, and Virginia—that implemented [voter ID] laws for the first time in 2014." *Id.* at 2; cf. Ingraham, *supra* note 57 (discussing conclusions drawn by a political science working paper documenting "substantial drops in turnout for minorities under strict voter ID laws" that were passed in the wake of the 2008 presidential election). But see Lynn Bonner, *Democrats up in NC's Early-Voting Turnout*, NEWS & OBSERVER (Oct. 27, 2014, 10:42 PM), <http://www.newsobserver.com/news/politics-government/state-politics/article10109558.html> [<https://perma.cc/8SLK-3JWT>] (noting the "spike" in early-voting turnout in North Carolina during the 2014 elections).

406. 539 U.S. 306 (2003).

407. *Id.* at 328. *Grutter* was the first U.S. Supreme Court case since *Bakke* to address race-conscious admissions in higher education. See *id.* at 314 (describing *Bakke* as "this Court's most recent ruling on the use of race in university admissions"). The Court in *Bakke* struck down the University of California at Davis's consideration of race. 438 U.S. 265, 320 (1978) (opinion of Powell, J.). However, Justice Powell separately concluded that a diversity-based admissions policy could survive constitutional review if it was appropriately narrowly tailored. *Id.* at 311–12.

close of her majority opinion upholding a law school's narrow use of race in admissions, Justice O'Connor intimated that affirmative action may no longer be necessary "in 25 years."<sup>408</sup> This reference led some of the dissenting Justices and other commentators to assume that the Court had set an expiration date for race-conscious student admission policies.<sup>409</sup>

Each of these cases illustrates how the Court's misplaced focus on time disguises discrimination's adaptive dimensions.<sup>410</sup> Only causes and effects that are knowable and neatly unfold within discernible periods count in the equal protection calculus. Causes and effects that are too remote in time are beyond constitutional remedy.

### III. WHAT CAN LAW DO?

The previous Part discussed the problems with constitutional doctrine and the Court's cognizance of adaptive discrimination for a brief period following *Brown*. The discussion in Part II also examined law's subsequent shift to a time-based narrative that weakened the constitutional justification for remedial measures. This Part asks what, if anything, law can do. It returns to the racial tragedy involving the fatal shooting of an unarmed black teenager by the police in the beginning of this Article. Section III.A addresses the question of whether progress is achievable given the nature of adaptive discrimination. Section III.B proposes changes to constitutional law that would enable the creation of adaptive enforcement methods. Section III.B outlines a more innovative, dynamic enforcement mechanism—one that involves courts, legislatures, and communities—to curb adaptive discrimination.

408. *Grutter*, 539 U.S. at 343 ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."); *see also* Vikram David Amar & Evan Caminker, 30 HASTINGS CONST. L.Q. 541, 550–54 (discussing Justice O'Connor's use of time in *Grutter* as reflecting a desire to "structure a constitutional transition period" to a "constitutionally preferable state of affairs" in which race-conscious admissions are no longer necessary).

409. *See, e.g., Grutter*, 539 U.S. at 386 (Rehnquist, C.J., dissenting) ("The Court suggests a possible 25-year limitation on the Law School's current program.").

410. *See* Michelle Adams, *Causation and Responsibility in Tort and Affirmative Action*, 79 TEX. L. REV. 643, 647 (2001).

A. *Is Racial Progress Possible?*

David Luban theorizes that all “[l]egal argument is a struggle for the privilege of recounting the past.”<sup>411</sup> In the area of race, however, legal argument also requires space for narratives that allow us to “name our reality.”<sup>412</sup> Existing constitutional doctrine demands that we see racial discrimination as narrow, siloed, and time limited. Accordingly, it looks past the systemic, dynamic, and regenerative effects of disbanded government policies and the private choices that such policies have enabled.

All of this raises an obvious question, which is whether law *can* do anything. This question naturally flows from the very premise of adaptive discrimination—that public and private actors reengineer racially subordinating schemes that evade law, the effects of which persist through social norms and practices that look past the resulting racial disadvantage. Previous sections also explored the linear assumptions that are embedded in constitutional doctrine, which has curbed judicial and legislative remedies and affirmative action policies that sought to address pervasive racial inequality. Therefore, one might reasonably ask whether I have too much faith in the power of law (and in the willingness of those entrusted to implement it) as a tool for advancing racial justice.

I vacillate between optimism and pessimism about the possibilities for law-based reform.<sup>413</sup> For this reason, this Article has carefully suggested that adaptive discrimination may be “curbed,” rather than “remedied.” I use this distinction to convey some ambivalence about our ability to dislodge racial subordination and the utility of law as a means for undoing racial caste. Here I am channeling Professor Derrick Bell, who regarded the search for racial progress as something akin to a fool’s errand.<sup>414</sup> Bell contended that

411. David Luban, *Difference Made Legal: The Court and Dr. King*, 87 MICH. L. REV. 2152, 2152 (1989).

412. See Crenshaw, *supra* note 131, at 1336.

413. See generally *id.* at 1385–86 (discussing the “dilemma” presented to racial reformers by relying on liberal rights-based reform).

414. See Bell, *supra* note 23, at 79 (“Black people will never gain full equality in this country. Even those herculean efforts we hail as successful will produce no more than temporary ‘peaks of progress,’ short-lived victories that slide into irrelevance as racial patterns adapt in ways that maintain white dominance.”); cf. DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 13–14 (1992) (“For too long, we have worked for substantive reform, then settled for weakly worded and poorly enforced legislation, indeterminate judicial decisions, token government positions, even holidays.”). David Luban has also echoed this view. See, e.g., Luban, *supra* note 411, at 2152.

the centuries-deep evidence of black oppression indicates that blacks will be forever consigned to a permanent, subordinate status.<sup>415</sup> He resisted the notion that racial struggle should be conceived as a quest for lasting progress. Instead, he urged that the purpose of struggle is to find meaning in the practice of resistance.<sup>416</sup> As Bell conceived it, however, achieving that meaning requires abandoning the futile search for permanent equality, which he described as “more illusory than real.”<sup>417</sup>

I agree with Bell that the long trajectory of racial subordination makes it impossible to have inordinate faith in the legal system.<sup>418</sup> However, I part ways with him on the view that racial progress over the long term is a lost cause and that the use of “law”—in the form of courts who enforce it, legal actors who implement it, and doctrine itself—for this purpose is senseless. While racial disadvantage is persistent and very real, we cannot credibly say that we have not made *any* progress.<sup>419</sup> Nor can we afford to sideline courts in this project.<sup>420</sup> Indeed, if we are to make meaningful headway, we must be able to draw on *all* instruments of law, including the courts, legislatures, elected officials, and, of course, the people themselves.<sup>421</sup>

To state the obvious, not so long ago it was unimaginable that we would have a black president. Three-hundred years ago, it was likely inconceivable that slavery would eventually be declared unconstitutional. One-hundred years ago, few would have expected the Supreme Court to strike down de jure segregation. None of this just “happened,” of course. Progress unfolded through the

415. See Bell, *supra* note 23, at 79 (describing the permanence of black inequality as “a hard-to-accept fact that all history verifies”).

416. BELL, *supra* note 414, at 198 (discussing the search for “meaning” as the real “success” in racial struggle).

417. *Id.* at 13.

418. See Crenshaw, *supra* note 131, at 1349.

419. *Id.* at 1378 (“[D]espite these disparate results, it would be absurd to suggest that no benefits came from these formal reforms, especially in regard to racial policies, such as segregation, that were partly material but largely symbolic.”).

420. For a contextualized analysis of the role of law as a tool for racial justice, see generally *id.* at 1349–70 (discussing the pragmatic use of legal rights). Aspects of this Article also raise fundamental questions about the power of law to counter “[w]hite race consciousness” and whether the rule of law is capable of embracing the framework of adaptive discrimination when such an embrace necessarily challenges the very ideological system upon which law is based. *Id.* at 1375. A fuller exploration of these questions, however, is beyond the scope of this Article.

421. School desegregation programs have achieved some success through systemic enforcement. See James S. Liebman, *Desegregating Politics: “All-Out” School Desegregation Explained*, 90 COLUM. L. REV. 1463, 1465–75, 1523 (1990).

generations due to resistance by untold numbers of people pushing to change laws and behavior in large and small ways. Thus, to make another crucial point, I do not harbor any illusions that change *originates* with law. Although a deeper exploration of these points is beyond the scope of this Article, social movements are also essential for legal reform.<sup>422</sup>

At bottom, this Article takes the view that racial progress is possible. But progress, like discrimination, ebbs and flows over time. Therefore, we need to extend our time horizons in evaluating our relative success.<sup>423</sup> As a practical matter, this means that law should treat racial discrimination as an endemic and complex problem that requires systemic, dynamic, and strategic responses and, just as importantly, indefinite vigilance.<sup>424</sup> More fundamentally, we have to accept that the improvements we seek now may not bear fruit until we are long gone.

We can analogize systemic racial inequality to climate change to help illustrate the point.<sup>425</sup> The seeds of our current climatic activity were planted long ago, but the effects in many ways are only now becoming apparent.<sup>426</sup> As with climate change, it will take significant time to reengineer and reconstruct our racial system. To do this, we need more innovative enforcement mechanisms that are as continuous, responsive, and fluid as the problem itself. Although a complete exploration of these points is beyond the scope of this Article, the next Section sketches the framework for this enterprise and the contours of what it might look like.

### B. *Creating an Ecosystem for Racial Equality*

How might we advance an adaptive enforcement mechanism to create an ecosystem for racial equality in places like Ferguson, Missouri and the St. Louis metropolitan area? Such an expansive

422. See generally, e.g., William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 419 (2001) (“The modern meaning of the Equal Protection Clause owes much more to the power and norms of the civil rights and women’s liberation movements than to the original intent of the Fourteenth Amendment’s framers.” (citing Ruth Bader Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 WASH. U. L.Q. 161, 162)).

423. Cf. DANIEL KAHNEMAN, THINKING FAST AND SLOW 406–07 (2011) (describing the mind’s limited capacity to process time in making decisions).

424. Cf. Crenshaw, *supra* note 131, at 1382 (discussing the strategic importance of making demands that lie within the institutional logic of the dominant discourse).

425. See Powell, *supra* note 227, at 797–98 (analogizing to climate change).

426. See Sterman, *Climate Change*, *supra* note 44, at 811–12.

project would necessarily involve the investment of federal, state, and local government resources and the attention of courts and legislatures, as well as individuals working within and across affected communities.<sup>427</sup> As discussed earlier in this Article, each of these constituencies has had a hand in the creation of adaptive discrimination over a period of generations. Each must be involved in curbing its operation.

This enterprise neither begins nor ends with constitutional law, as it first requires the willingness of each of the above actors to commit to the problem itself. This, of course, presents its own set of daunting political and practical problems. However, in key respects, constitutional law is also a barrier. It is an impediment to affirmative litigation against governmental actors insofar as it requires a specific showing of racially discriminatory intent. And it limits both the authority of federal courts to redress discrimination that has persisted through time and the power of Congress to target adaptive discrimination through legislation that burdens states and local jurisdictions. Thus, constitutional law both shields adaptive discrimination from the efforts of those who seek to eradicate racial inequality and provides those who champion such inequality with a sword against remedial measures that seek to address it, particularly at the federal level. This is a problem given that federal institutions and resources will need to be involved in this enterprise.

The subsections below suggest ideas for navigating some of this terrain, and end by focusing on strategies that can be enforced by communities at the state and local level—largely free of the constitutional constraints identified earlier. I also briefly discuss some of the barriers to their implementation.

### 1. Clearing the Path to Systemic Change

As the previous Sections discussed, constitutional law denies federal courts, Congress, and proponents of voluntary affirmative action the flexibility to respond to adaptive discrimination.<sup>428</sup> This subsection proposes changes that would help clear the path for more

427. See Reva B. Siegel, *Equality's Frontiers: How Congress's Section 5 Power Can Secure Transformative Equality (as Justice Ginsburg Illustrates in Coleman)*, 122 YALE L.J. ONLINE 267, 269 (2013), [http://www.yalelawjournal.org/pdf/1138\\_rwjspe3e.pdf](http://www.yalelawjournal.org/pdf/1138_rwjspe3e.pdf) [<https://perma.cc/5Y4M-T5CB>] (observing that “the interplay among social movements, democratic bodies, and courts” works together to create “new approaches to enforcing equality”).

428. See Rich, *supra* note 14, at 238 (discussing the benefits of divergence between constitutional and statutory law).



systemic reform in ways that align with the respective institutional capabilities of these various actors.

For example, we can readily conclude that courts cannot realistically (or even appropriately) manage discrimination's systemic and dynamic nature. In the context of the problems identified in this Article, courts are better suited for resolving challenges to specific institutional practices that foster racial inequality.<sup>429</sup> Legislatures and government agencies, on the other hand, can study discrimination's dynamic qualities and offer solutions that account for its complexity.

The preclearance mechanism in the Voting Rights Act is a good example of an effective strategy and how it might work using the courts and the executive branch in a complementary enforcement framework. Though it has been disabled by the Court in *Shelby County*, Congress could still pass legislation that revives the provision using a different coverage formula. Moreover, there are no federal constitutional barriers for state legislatures to adopt the same kind of preclearance mechanism for their own state laws. However, as the federal preclearance provision itself shows, there are clear practical problems with relying on state legislatures to police themselves, especially (for reasons already discussed) with regard to racial discrimination.

As discussed throughout this Article, the Court's express and implicit use of time as a sword against efforts to redress racial inequality is a continuing problem. The assumption that discrimination expires, or is no longer constitutionally cognizable, with the passage of time has led the Court to conclude that "de facto" racial segregation in public schools is beyond judicial remedy, to decide that Congress lacked constitutional authority to renew the Voting Rights Act's preclearance formula, and to observe that diversity-based affirmative action may no longer be necessary in twenty-five years. The same assumptions about time underlie the Court's determination that efforts to redress "societal discrimination"—which is "ageless in its reach into the past"<sup>430</sup>—cannot be the basis for voluntary, race-specific affirmative action in

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429. See Margo Schlanger, *Civil Rights Injunctions over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 555 (2006) (describing court orders as "one of the primary vehicles by which litigation has driven social change" and institutional reform).

430. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (opinion of Powell, J.).

higher education and government contracting or voluntary integration programs in K-12 public schools.

Of course, time has been a factor even in constitutional decisions that favor an adaptive framework. Recall that the Court's decision in *Green* invoked time in deciding that it was too soon to conclude that the school board had disestablished its dual system.<sup>431</sup> And, in *Katzenbach*, the Court determined that Congress could constitutionally shift the advantages of "time and inertia" from the "perpetrators of evil" to its "victims."<sup>432</sup>

Still, for reasons already discussed, it is risky to legitimize time as a factor in adjudicating racial discrimination. Because discrimination mutates, it is easier to elude detection, which means that discrimination is likely to persist over some period. As demonstrated in the constitutional cases discussed earlier, accepting time as a consideration invites the possibility that it will be used to invalidate policies and practices that promote racial equality. Therefore, this Article calls for courts to abandon time, both as an explicit and implicit criterion, when judging the necessity of continuing discrimination remedies.

The use of time as a factor in constitutional adjudication, however, will be difficult to overcome as long as intent is the standard and the plaintiff bears the burden of proving that present inequality is "traceable" to prior intent. The passage of time naturally makes it harder for the plaintiff to demonstrate (and a court to discern) an earlier decisionmaker's motivation, as recollections of prior events dim and records documenting such proof are lost.

Ideally, we would abandon racial intent.<sup>433</sup> But, short of that scenario, we might look to *Green* for a possible solution. In *Green*, the Court shifted the burden to the school board to prove that it had eliminated "root and branch" the "vestiges" of its prior conduct.<sup>434</sup> As the Court observed in *Freeman v. Pitts*, the "school district bears the burden of showing that any current racial imbalance is not traceable in a proximate way to [a] prior constitutional violation."<sup>435</sup>

431. *Green v. Cty. Sch. Bd.*, 391 U.S. 430, 439 (1968).

432. *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966), *abrogated by* *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2631 (2013).

433. For an explanation of how an intent-free standard would work in the context of school integration, we can look to Justice Powell's concurrence in *Keyes v. School District Number 1*, 413 U.S. 189, 217–53 (1973).

434. *See, e.g., Green*, 391 U.S. at 439.

435. *Freeman v. Pitts*, 503 U.S. 467, 494 (1992).

Of course, as discussed earlier, *Freeman* also unhelpfully concluded that white flight was not proximately related to past intentional discrimination,<sup>436</sup> which limits its practical utility here. Nevertheless, the fact that the school board bears the burden of proof in desegregation cases changes the constitutional conversation by giving plaintiffs leverage to exact changes to school board practices that perpetuate racial inequality. The rebuttable presumption that continuing racial “imbalance” is connected to unconstitutional discrimination by the school district allows plaintiffs to negotiate changes to educational practices that harm black students and to require school districts to provide black students with more educational resources.<sup>437</sup>

Ellen Katz describes comparable dynamics in the analogous context of Section 5’s preclearance model. Placing the burden on the defendant, rather than on the plaintiff, creates “an affirmative tool of governance”<sup>438</sup> that, at least prior to *Shelby County*, enabled plaintiffs to challenge voting policies and practices that had a discriminatory impact while insulating government officials from some of the political pressures they might otherwise face not to “cave” to plaintiffs’ demands.<sup>439</sup> An adaptive framework could apply the same burden to any public institution with a history of intentional racial discrimination. That institution would be under an affirmative obligation to show that the challenged practice was not traceable to its prior unconstitutional conduct. The benefit of this approach is that it hews reasonably closely to constitutional precedent. The disadvantage is that it remains tethered to findings of racial intent. Moreover, any remedies would be confined to the particular institution itself.

The next subsection sketches components of an adaptive framework that would engage state legislatures, state courts, and state and local communities in this project.

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436. *Id.* at 494–95.

437. See Holley-Walker, *supra* note 38, at 432–42 (discussing the educational benefits of integrated schools and recent developments in school desegregation cases).

438. See Ellen D. Katz, *South Carolina’s “Evolutionary Process”*, 113 COLUM. L. REV. SIDEBAR 55, 64 (2013), <http://columbialawreview.org/wp-content/uploads/2013/03/Katz-113-Colum.-L-Rev.-Sidebar-55.pdf> [<https://perma.cc/3FLE-K3VF>].

439. *Id.* (“[S]ection 5 shaped the development of a less burdensome policy without forcing state officials to spend political capital convincing the skeptical or hostile of anything beyond the measure’s compliance with federal law.”).

## 2. Enforcement Strategies for Communities

This subsection explores a set of interactive, dynamic strategies that could be implemented at the local and regional level.<sup>440</sup> Because states have plenary powers over municipalities, they could require localities to comply with these enforcement mechanisms.<sup>441</sup> The obvious drawback of course is that recalcitrant states could reject these mechanisms altogether, leaving localities that were otherwise receptive to such initiatives with minimal recourse.<sup>442</sup> Indeed, as discussed throughout this Article, there is good reason to be concerned about whether states with a recidivist history of racial discrimination would agree to racial justice initiatives at the local level. On the other hand, enforcement against states would require some federal intervention and could potentially raise some of the federal constitutional problems discussed in previous sections.<sup>443</sup> Thus, any proposal would have to be evaluated and weighed in light of these advantages and disadvantages.

The mechanism that I contemplate here draws on a proposal by R.A. Lenhardt to use “race audits” to identify local policies and practices that perpetuate racial inequality.<sup>444</sup> Again, we can look to the preclearance provision of the 1965 Voting Rights Act as a model for determining which jurisdictions would be subject to a race audit. As discussed above, the Act required certain jurisdictions with a history of persistent racial discrimination to submit any proposed voting changes for federal review. Under my framework, race audits would be performed in local jurisdictions and metropolitan areas that are symptomatic of adaptive discrimination. These symptoms might

440. Cf. R.A. Lenhardt, *Localities as Equality Innovators*, 7 STAN. J. C.R. & C.L. 265, 270–75 (2011) (exploring the potential for equality innovation at the local level).

441. See *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907) (concluding that localities are creatures of the state and are subject to the state’s plenary power and authority).

442. See, e.g., *New Orleans Campaign for a Living Wage v. City of New Orleans*, 825 So. 2d 1098, 1107–08 (La. 2002) (holding that state law barred local governments from establishing a minimum wage that applied to private employers).

443. See, e.g., Catherine Y. Kim, *Changed Circumstances: The Federal Rules of Civil Procedure and the Future of Institutional Reform Litigation after Horne v. Flores*, 46 U.C. DAVIS L. REV. 1435, 1437–38 (2013) (discussing “heated [scholarly and political] debate” about the role of federal courts in institutional reform); David Schoenbrod, *The Immortality of Equitable Balancing*, 96 VA. L. REV. BRIEF 17, 18 (2010), <http://www.virginialawreview.org/sites/virginialawreview.org/files/schoenbrod.pdf> [<https://perma.cc/ZV8A-CNRM>] (arguing that judicial discretion “does no violence to legislative policy choices”).

444. See R.A. Lenhardt, *Race Audits*, 62 HASTINGS L.J. 1527, 1534 (2011); see also Robert E. Suggs, *Racial Discrimination in Business Transactions*, 42 HASTINGS L.J. 1257, 1260–64 (1991) (providing a history of local policies contributing to racial inequality).

include, for example, high degrees of residential and public school segregation (intra- as well as interdistrict) and aggressive policing practices that target marginalized racial communities. How the jurisdiction allocates public resources and services and whether it concentrates the least desirable public facilities in distressed minority neighborhoods or towns would also be relevant.

Localities and metropolitan regions that display these symptoms would be subject to a race audit. As conceptualized by Lenhardt, the audit team would bring together professionals and academics trained in the audit function, as well as community organizers and other affected individuals.<sup>445</sup> This team would be tasked with uncovering practices that have fostered racial inequality and with making recommendations for curbing those practices' present effects. Proposed government policies would also be evaluated for their racial impact. An "audit board" would design remedial measures that would take appropriate account of the adaptive nature of the targeted problems.<sup>446</sup> Because adaptive discrimination often crosses jurisdictional boundaries, ideally the audit board would consist of both local officials and officials from the surrounding metropolitan area.<sup>447</sup>

A court consisting of appointed judges, which was specially constituted to examine and enforce the audit team's recommendations, would order remedies tailored to curb adaptive discrimination and preemptively bar implementation of other harmful measures. Because an adaptive enforcement model requires an active monitoring mechanism, the court's jurisdiction would be indefinite, rather than time limited, and would span the full range of racially impacted systems. Further, the court would be empowered to take account of time delays in evaluating a policy or program's relative success. The model contemplates that the court and the audit team would periodically revisit any solutions to reevaluate their effectiveness.

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445. This form of community engagement could provide a democratic forum for local citizenry to exercise its voice and power around consequential matters of race. *See* Eskridge, *supra* note 422, at 419 (discussing social movement theory in relationship to law).

446. *See generally, e.g.,* Sterman, *Climate Change*, *supra* note 44 (calling for an interdisciplinary approach to system dynamics).

447. For one model of how this might work, see GERALD E. FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* 61–63 (2001) (discussing the use of regional legislatures).

A number of questions about the logistics of this enforcement system would have to be sorted out. One practical question is whether courts would have the power to enjoin local officials who refused to cooperate or comply with a race audit. Another question is whether localities would have recourse to appeal the orders of the specially constituted court. The audit team itself would also have to be appropriately staffed and monitored, which raises budgetary implications. Other political questions arise about how to constitute the audit board and its governance structure.

How might we apply this framework to Ferguson? The account of adaptive discrimination in Ferguson and the surrounding St. Louis region described in Section I.B offers an example of what an audit team might uncover, as well as clues for diagnosing the reasons for persistent racial inequality in the town and the surrounding areas.<sup>448</sup> Adaptive enforcement measures might include a system of metropolitan zoning that would allow affordable housing to be sited throughout the region. Policies could be designed to address the intergenerational impact of poverty, such as intensive educational programs for both parents and children and various forms of funding to improve rates of homeownership among marginalized communities. The audit team could also make recommendations to improve relationships between the black community and the police, including the elimination of ticketing practices that target black residents. The monitoring mechanisms would have to be deployed to respond to any feedback effects that result from these policies. For example, we might imagine Ferguson shifting to new funding sources that continue to disadvantage the black community. The audit team, the board, and the court would have to remain active and alert to these kinds of adaptive strategies.

### 3. The Challenges of a Systemic Approach

The framework described above has clear limitations that are inherent to systemic approaches.<sup>449</sup> For example, enforcement likely

448. Indeed, a commission established to study the problems in Ferguson has already convened and issued a report. FERGUSON COMM'N, FORWARD THROUGH FERGUSON: A PATH TOWARD RACIAL EQUITY (2015), [http://3680or2khmk3bzkp33juica1.wpengine.netdna-cdn.com/wp-content/uploads/2015/09/101415\\_FergusonCommissionReport.pdf](http://3680or2khmk3bzkp33juica1.wpengine.netdna-cdn.com/wp-content/uploads/2015/09/101415_FergusonCommissionReport.pdf) [<https://perma.cc/NC4T-NAP7>].

449. See David A. Graham, *What Can the New Ferguson Report Achieve?*, THE ATLANTIC (Sept. 14, 2015), <http://www.theatlantic.com/politics/archive/2015/09/what-can-the-new-ferguson-report-achieve/405205/> [<https://perma.cc/BZ3L-RNAE>] (identifying political and practical problems with the implementation of systemic solutions).

would have to be carried out in ways that track institutional and organizational structures and processes, including matters of funding, implementation, and management. As a result, enforcement itself runs the risk of replicating the very problems that an adaptive framework seeks to address. Although an enforcement framework could require collaboration among and between government officials and private citizens to avoid some pitfalls, political and practical challenges are inevitable.

In addition, law itself could use some cultural and professional reorientation in its approach to racial discrimination. Lawyers are trained to atomize problems—to break them down into their specific components according to relevant standards of proof and to align proposed remedies with available legal theories. Thus, law does not offer a “one-stop shop” for addressing racial discrimination’s systemic fluidity. Indeed, it is hard to imagine what that would look like. This is another reason why ongoing community engagement and feedback and continuing grassroots pressure on legal and political actors would be crucial to the success of an adaptive enforcement mechanism.

Additional challenges might include a lack of resources and funding at the state and local level,<sup>450</sup> requiring federal support and intervention. Moreover, the entities that comprise the race audit team could be readily captured by political interests or compromised by the very white privilege norms, racialized class ideologies, and implicit racial bias I discussed earlier. It is also possible that those subject to the enforcement mechanism would simply decide to exit the new order altogether by moving to another jurisdiction or reconstituting new communities under new sets of laws and rules.<sup>451</sup> Thus, while the enforcement mechanism described here would allow useful and innovative techniques for addressing adaptive discrimination, additional work would have to be done to sort out its logistics and to reorient its participants on how to maximize its effectiveness.

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450. *But see* Clayton P. Gillette, *In Partial Praise of Dillon’s Rule, or, Can Public Choice Theory Justify Local Government Law?*, 67 CHI.-KENT L. REV. 959, 998 (1991) (“The higher costs that attend lobbying at the state level likely mean that fewer groups concerned with parochial issues will have a sufficient advantage to dominate at that level.”).

451. *See, e.g.*, Myron Orfield, Milliken, Meredith, and *Metropolitan Segregation*, 62 UCLA L. REV. 364, 377 (2015) (observing that homeowner associations helped to “effectively replace[]” racial zoning laws after they were struck down).

## CONCLUSION

We have made significant racial progress in this country. And yet, daunting problems remain. This Article has argued that these problems are a function of racial discrimination that is more complex than our limited cognitive models and constitutional doctrine allow and that public and private actors have been complicit in the creation and maintenance of our racially compromised systems. Our linear, time-centered approaches to addressing racial discrimination are destined to fail us, as they have again and again.

Thus, our best hope for promoting racial justice is to embrace the precepts of adaptive discrimination. We must change the constitutional standards that prevent us from addressing it, and we must develop cross-institutional enforcement models that are more responsive to racial discrimination's systemic and dynamic nature. Finally, we must accept that the quest for racial equality and freedom may continue for some time and that such a quest requires persistence and vigilance through the generations.